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No. _____

Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1988

JACK ABADJIAN, MARK BALL, JOSEPH BROWN, JOHN EGHENIAN, BRAD MAY, NASSIR MAZAREI, DONALD PROUSE, AL ROSENSTEIN, ARAM SHISHMANIAN, JOE SMIDERLE and STEPHEN WEBBER,

Petitioners,

vs.

GULF OIL CORPORATION, a Pennsylvania corporation, THRIFTY OIL CORPORATION, a California corporation

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEAL OF THE STATE OF CALIFORNIA, SECOND APPELLATE DISTRICT, DIVISION TWO

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QUESTIONS PRESENTED

1. Do State Courts enjoy concurrent jurisdiction to enforce rights created by the Petroleum Marketing Practices Act, 15 United States Code § 2801 – 2806 as supported by the language and decisional history of the statute or, do federal courts hold exclusive jurisdiction over PMPA actions as announced by the district court in *Rustom v. Atlantic Richfield Company,* 618 F. Supp. 210 (C.D. CA 1985) a decision based upon analogizing the jurisdictional language of the Petroleum Marketing Practices Act to the jurisdictional language in Title VII of the Civil Rights Act?

2. May a state court of appeal disregard a remand order and subsequent ruling of the circuit court on appeal, in reversing the trial courts decision for Petitioner, based *only* on its collateral determination that the state court lacked jurisdiction, in contravention of both the opinion of the district court and the prohibition of 28 U.S.C. § 1447(d)?

PARTIES TO THE PROCEEDING BELOW

Petitioners, JACK ABADJIAN, MARK BALL, JOSEPH BROWN, JOHN EGHENIAN, BRAD MAY, NASSIR MAZAREI, DONALD PROUSE, AL ROSENSTEIN, ARAM SHISHMANIAN, JOE SMIDERLE and STEPHEN WEBBER, and Defendants, GULF OIL CORPORATION, GULF OIL REAL ESTATE DEVELOPMENT CORPORATION, a wholly owned subsidiary of GULF OIL CORPORATION, assorted individual employees of GULF, AND THRIFTY OIL CORPORATION were all parties to the action below.

Although all Petitioners met the definition of 'franchisee', only Respondent Mobil Oil Corporation met the definition of 'franchisor' and accordingly, they are the exclusive parties to the issues presented to this Court. However, the interrelatedness of Petitioner's claims against Thrifty Oil Corporation as well as Gulf, have prompted Petitioners inclusion of Thrifty herein, although admittedly as merely an interested part.

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Petitioner respectfully petitions this Court for issuance of its Writ of Certiorari as follows:

INTRODUCTION

The Federal Petroleum Marketing Practices Act (hereinafter "PMPA"), 15 United States Code § 2801, et seq., was enacted June 19, 1978, to establish "minimum federal standards governing the termination and nonrenewal of franchise relationships for the sale of motor fuel by the franchisor or supplier of fuel." S.Rep. No. 731, 95th Cong., 2d Sess. 15, *reprinted in* 1978 U.S. CODE CONG. & AD. NEWS 873. Congress was concerned "with the disparity of bargaining power between distributors and retailers of motor fuel. With this remedial purpose in mind, Congress sought to limit the circumstances in which a distributor could terminate a franchise relationship with the retailer." *Bsales v. Texaco, Inc.*, 516 F. Supp. 655, 661 (D. N.J. 1981). As the Seventh Circuit Court of Appeals has concluded:

> ". . . [A]s remedial legislation, the Act must be given a liberal construction consistent with its overriding purpose to protect the franchisees. [citations]" (*Brach v. Amoco Oil Co.*, 677 F.2d 1213, 1220-1221 (1982).)

When analysing whether federal courts have exclusive jurisdiction over a claim brought under a federal law, one begins with the presumption that concurrent state and federal jurisdiction exists. Recently the California Supreme Court followed this presumption in *Cianci v. Superior Court*, 40 Cal.3d 903, 710 P.2d 375 (1985), finding concurrent jurisdiction to exist in actions involving the Federal Racketeer Influenced and Corrupt Practices Act, wherein it stated:

> " 'Concurrent jurisdiction has been a common phenomenon in our judicial history, and exclusive federal court jurisdiction over cases arising under

federal law has been the exception rather than the rule.' (Citation omitted). Accordingly, '[i]n considering the propriety of state court jurisdiction over any particular federal claim, [we] begin with the *presumption* that state courts enjoy concurrent jurisdiction. (Citations omitted) (emphasis added)." (Id. at page 910).

In *Gulf Offshore Co. v. Mobil Oil Corp.*, 453 U.S. 473, 101 S.Ct. 2870, (1981), this Court said:

"The general principal of state court jurisdiction over cases arising under federal law is straight forward: state courts may assume subject-matter jurisdiction over a federal cause of action *absent provision by Congress to the contrary or disabling incapability between the federal claim and state court adjudication.*" (emphasis added) (Id. at pages 477-478).

The Court in *Johnson v. Mobil Oil Corporation*, 364 Pa.Super. 275, 528 A.2d 155, 163-164 (1987) gives perhaps the most thorough analysis of the issue *as applied to the PMPA* and concludes:

". . . We perceive no incompatibility between state court jurisdiction and promoting Congress' intent to protect the needs of both franchisees and franchisors, to remedy disparity in bargaining power and to prevent arbitrary or discriminatory termination or nonrenewal. For the foregoing reasons, we find that a state court enjoys concurrent jurisdiction over claims under the PMPA." (528 A.2d at 164).

The State of California in *Niakan v. Samaan*, 199 Cal.App.3d 716; 245 Cal.Rptr. 24 (1988) has recently taken the opposite position, holding that federal courts have exclusive jurisdiction to enforce the PMPA. There is no federal circuit Court of Appeal opinion on this issue and the federal district courts are divided with the decision upon which *Niakan* rests, *Rustom v. Atlantic Richfield Company*, 618 F.Supp. 210 (C.D. CA 1985) finding exclusive federal court jurisdiction, and *Ted's Tire Service, Inc. v. Chevron U.S.A. Inc.*, 470 F.Supp. 163 (D. Conn. 1979) finding concurrent state court jurisdiction. Every prior court

to consider this issue has determined that concurrent jurisdiction exists; at least seven other states having considered the issue, exercising jurisdiction over the PMPA in reported decisions.

The first issue presented by this Petition is whether state courts enjoy concurrent jurisdiction to enforce rights created by the PMPA.

Title 28 of the United States Code § 1447(d) provides in pertinent part:

> "An order remanding the case to the state court from which it was removed is not reviewable on appeal or otherwise . . . "

As hereafter discussed, in the trial court below, the case at bar was removed not once, but twice by Defendants to federal court. On both occasions, the federal court remanded the action for adjudication of the dealer's PMPA claims in state court and the Ninth Circuit Court of Appeal *dismissed* Defendant's appeal citing this Court's Opinion in *Thermatron Products, Inc. v. Hermansdorfer*, 423 U.S. 343; 96 S.Ct. 584 (1976).

The second issue presented by this Petition is whether a state court of appeals is precluded from entertaining questions concerning the proper jurisdiction for actions brought under a federal statute when a federal court has chosen rightly or wrongly, to remand the case after removal for adjudication of Petitioner's PMPA claims in state court.

OPINIONS BELOW

The Opinion of the Court of Appeal of the State of California, Second Appellate District, Division Two, is printed in Appendix A hereto; the Court of Appeal declining to publish said Opinion. Also appended hereto,

is the Opinion of the United States District Court, Central District of California.

A Petition for Hearing to the California Supreme Court was denied on July 20, 1988, with Justice Mosk dissenting.

JURISDICTION

The jurisdiction of this Court is invoked upon the following grounds:

On May 8, 1988, the Court of Appeal of the State of California, Second Appellate District, Division Two, filed its Opinion in this case reversing Summary Judgment for Petitioner on PMPA grounds, having determined that the federal courts hold exclusive jurisdiction over PMPA causes of action. The applicable portion of the Court of Appeal Opinion is set forth in Appendix A, pages 4 through 5, attached hereto.

On July 20, 1988, the California Supreme Court filed its Order Denying Dealer's Petition for Review in the California Supreme Court, and this Petition has been filed within 90 days of that date.

Jurisdiction for review exists pursuant to United States Supreme Court Rules, Rule 17.1(b) and 17.1(c) by reason of a conflict amongst both state courts and federal courts upon a federal issue, and by reason that the conflict presented relates to an important question of federal law which has not been, but should be, settled by this Court. The exclusive federal jurisdiction holdings of the California Court of Appeals here, and in *Niakan v. Samaan*, 199 Cal.App.3d 716, *supra*, and *Rustom v. Atlantic Richfield Co., supra*, 619 F.Supp. 210 directly conflict with the state and federal court holdings of *Johnson v. Mobil Oil*

(PA. Super.), *supra*, 528 A.2d 155, 163-164, *Ted's Tire Service Inc. v. Chevron U.S.A. Inc.*, *supra*, 470 F.Supp. 163, and the exercise of jurisdiction by at least seven other states.

Because opposite conclusions have been reached in published decisions upon the issue of whether concurrent or exclusive federal jurisdiction exists as to actions created by the PMPA, the validity of proceedings involving the PMPA undertaken in state courts currently and in the future remain open to question until such time as the jurisdictional issue is resolved. Keeping in mind the compelling need for the PMPA and its protective provisions, a need found to exist by Congress, it is submitted that the issue presented herein is an important question of federal law to be settled by this Court. Moreover, this Court has not heretofore considered any issues arising under the PMPA. In the interest of an orderly and proper development of the law in this area of great public importance, an area also already under the eye of federal agencies, resolution of this issue is deserving of this Court's attention and interpretation.

Further, remand orders pursuant to 28 U.S.C. § 1447(d) are not reviewable on appeal or otherwise as has been long established by this Court. Therefore, whether a state court is precluded from revisiting the issue of proper jurisdiction of the causes of action before it presents yet another issue upon which the Decision of the California Court of Appeal below conflicts with previous district court decisions, and additionally, the holding of this court on a federal question. In that this Court has expressly recognized that a remand order is a binding determination of jurisdiction whether or not that order might be deemed erroneous by an appellate court, the decision herein is in direct conflict and requires this Court's review. As set forth infra, application of 28 U.S.C. § 1447(d) to the possibly ambiguous or unforeseen

circumstances herein is deserving of this Court's interpretation and holding.

The validity of remand orders, an important mechanism by which the federal courts exercise control over their jurisdiction, will remain open to review or sidestepping by state courts until this issue is resolved.

STATUTORY PROVISIONS INVOLVED

This case involves two statutory provisions. The Petroleum Marketing Practices Act, 15 United States Code § 2801-2806, the provisions of which are set forth in Appendix G, and the Removal Statute 28 United States Code § 1447(d), the provisions of which are set forth in Appendix H. The jurisdictional language of the PMPA at issue in the present Petition is contained in 15 U.S.C. § 2805(a) as follows:

> "If a franchisor fails to comply with the requirements of § 2802 or 2803 of this Title, the franchisee may maintain a civil action against such franchisor. Such action *may be brought* without regard to the amount in controversy, in the district court of the United States in any judicial district in which the principal place of business of such franchisor is located or in which such franchisee is doing business. Except that no such action may be maintained unless commenced within one year after the later of –
> "(1) the date of termination of the franchise or nonrenewal of the franchise relationship; or
> (2) the date the franchisor fails to comply with the requirements of § 2802 or 2803 of this Title." (Emphasis Added).

The jurisdictional language of Title 28 U.S.C. § 1447(d) at issue in the present Petition is as follows:

"An order remanding a case to the State court from which it was removed is not reviewable on Appeal or otherwise . . . "

STATEMENT OF CASE

A. Facts and Lower Court Proceedings.

In early 1979, having concluded that business was not profitable in Southern California, Gulf announced a plan to sell its Los Angeles division assets. Shortly thereafter, Thrifty advised Gulf of its interest in purchasing Gulf's Southern California service stations and by Contract dated September 30, 1980, Gulf agreed to sell, and Thrifty agreed to purchase, all of Gulf's Los Angeles division service stations. When Gulf and Thrifty entered into the September 30, 1980 Contract, each Dealer occupied and operated a service station owned or leased by Gulf, pursuant to a franchise agreement which included a lease agreement and a gasoline supply agreement with Gulf.

Both Thrifty and Gulf recognized that the terms of their contracts and agreements would trigger the PMPA and therefore expressly agreed, in paragraph 18, subparagraph (c), of their contracts dated September 30, 1980, that each would abide by the provisions of the PMPA.

Consistent with its obligations under the PMPA Gulf identified its dealers to whom a right of first refusal was required to be given and thereafter, by letter dated November 24, 1980, notified its Los Angeles division dealers, stating in part:

"You will be given notification of the offer required by the PMPA to acquire the station yourself."

Thereafter Thrifty protested, disputing that the PMPA gave the dealers a right to first refusal.

In August, 1981, the Petitioners filed this action against Gulf and Thrifty alleging in their First Cause of Action that the dealers were entitled to a declaration of rights that (1) each dealer was a franchisee as defined in

15 U.S.C. § 2801; and (2) before Gulf could sell its interest in the dealer's service station premises to Thrifty, it must make a bona fide offer to sell their interest to the dealers pursuant to the PMPA.

Following the filing of the First Amended Complaint, both Gulf and Thrifty twice unsuccessfully attempted to remove the case to federal Court. Because the Ninth Circuit does not permit pendent party jurisdiction, and because there did not exist a separate and independent controversy as to Thrifty, remand was ordered pursuant to 28 U.S.C. § 1447(c) by the United States District Court for the Central District of California. The District Court Opinion, filed March 13, 1984, is attached as Appendix C. (App. p.8).

Thrifty applied to the United States Court of Appeals, Ninth Circuit, appealing the Decision of Remand and Gulf filed in addition, a Petition for Writ of Mandamus. The Ninth Circuit Court of Appeal dismissed Defendant's Appeal by Order dated July 3, 1984, citing *Thermatron, supra.* The Circuit Court's Minute Order is attached as Appendix D (App. p.24). The Circuit Court also denied the Petition for Writ of Mandamus, by Order dated August 22, 1984, attached as Appendix E (App. p.25).

Thereafter, the dealers moved for summary adjudication of issues on October 5, 1983. By their Motion, dealers sought adjudication that the September 30, 1980 Agreement between Defendants Gulf and Thrifty was an event and occurrence that "triggered" notice and first refusal rights in Gulf's interest, be it fee or leasehold, in the service station properties which the Dealers occupied and operated as franchisees pursuant to the PMPA, 15 U.S.C. § 2801 et seq. After taking the Motions under submission, the Court (Swearinger, J.) ruled that the Contract between

Gulf and Thrifty gave each dealer a right of first refusal, which was required to be offered 45 days prior to the closing date May, 1981. On December 10, 1984, the trial court entered its Minute Order in favor of the dealers holding:

> "The September 30, 1980 Agreement between Defendants was an event and an action that gave to each moving Plaintiff a right to first refusal to purchase Gulf's interest in their respective service stations. B. Under the [PMPA] Defendant Gulf was obligated to offer each moving Plaintiff the right as aforesaid at least 45 days prior to the agreed upon closing date of the Gulf sales of Thrifty (May 1981)."

The Trial Court's Minute Order, filed December 10, 1984, is attached as Appendix F (App. p.26). The Court's Minute Order further stated that the Court found that Counts 1, 6 and 7 of the dealer's Complaint "relate to rights under the PMPA" and further held that "PMPA jurisdiction is not exclusively in the Federal Courts." On September 11, 1985, at Gulf's request, the Trial Court granted severance of the First Cause of Action from the rest of the Complaint. The only issue remaining thereunder, was the purchase price to be paid by each dealer upon the exercise of his right of first refusal. In addition, the trial court awarded the dealers over $200,000 in costs and attorney's fees pursuant to statutory provisions contained in the PMPA. Gulf and Thrifty appealed asserting that the trial court lacked subject matter jurisdiction over PMPA causes of action, and all of the proceedings in the action were stayed pending resolution of the Appeal. The Court of Appeal reversed, holding that the PMPA is enforceable only in the federal courts and thus the trial court had erred in deciding the PMPA issues. The Court of Appeal Opinion filed May 8, 1988, is attached as Appendix A. (App. p.1).

On July 20, 1988, the California Supreme Court filed its Summary Order denying review of the Court of Appeal Decision. A copy of the Order of the California Supreme Court Denying Review is attached as Appendix B (App. p.7). Both in arguing the case in the Court of Appeal and in the Petition for Review in the California Supreme Court, the PMPA jurisdictional issue and the nonreviewability of Remand Orders pursuant to Title 28 U.S.C. § 1447(d) issues were raised.

B. Gulf's Assertion of the Exclusive Federal Jurisdiction Issue.

Following the filing of the dealer's Complaint Gulf and Thrifty sought removal on the basis that the dealer's claims under the PMPA created a federal question. Following the remand order and the dealer's Motion for Summary Adjudication of Issues in October 1983, Gulf and Thrifty again sought removal on the grounds that the PMPA was a federal statute, but the district court (Hatter, J.) held that the court had no jurisdiction over Thrifty because Thrifty was not a franchisor under the PMPA and there was no separate and independent controversy as between Gulf and Thrifty. (602 F.Supp. 874, 881-882 (1984) (App. C, p.16). Gulf thereafter petitioned the Ninth Circuit for a Writ of Mandate and Thrifty appealed from the district court's remand order. Both the Writ and Petition were denied (App. D, E) Gulf and Thrifty did not directly challenge the jurisdiction of the state court to hear the PMPA violation claims until June of 1987 when they sought relief in the California Court of Appeal, Second Appellate District, Division Two, from the Superior Court Order of December 10, 1984 in favor of the dealers under the PMPA.

Until *Rustom* was decided, there was a uniform body of state and federal law pronouncing the concurrent state court and federal court jurisdiction for claims brought under the PMPA. The only federal court decision addressing the issue held in favor of concurrent state

court jurisdiction. That case, *Ted's Tire*, 470 F. Supp. 163, *supra*, one of the first cases decided under the PMPA following its enactment in 1978, announced that service station dealers could enforce their rights thereunder in either a state or federal Court:

> "[PMPA] stipulates that a civil action to redress a violation of the statute 'may be brought' in a federal district court; it does not state that such an action *must* be instituted in federal court. 15 U.S.C. § 2805. It has long been established, that absent any indication that the federal courts have exclusive jurisdiction over a particular subject, federal laws may be enforced in either the state of federal courts.
>
> * * *
>
> [T]here is nothing in the PMPA which suggests that the Connneticut Superior Court would not have had jurisdiction over a complaint brought under the PMPA." (*Ted's Tire, supra*, p. 2 at 165).

The California Courts agreed: *Cianci, supra*, ("[I]n the PMPA (15 U.S.C. § 2801, et seq.), for example, Congress created a private right of action without limiting jurisdiction to Federal Courts"); and the California Court of Appeal followed suit:

> "[W]e are cognizant that the state courts have concurrent jurisdiction to enforce the PMPA." (*California ARCO Distributors, Inc. v. Atlantic Richfield Corp*, 158 Cal.App.3d 349, 364 (1984).

Based upon *Cianci, supra*, and *California ARCO Distributors, Inc., supra*, it has been established law in California at all relevant times that state courts have concurrent jurisdiction over the PMPA actions.

After seven years of litigation, two remand orders and an appeal to the Ninth Circuit Court of Appeals, throughout which it was uniformly held that this dispute was properly within the Superior Court, judgment for the dealers was reversed, *solely* upon the basis of jurisdiction. In June, of 1987, almost six years after petitioners brought this lawsuit, and almost two years after the opinion was

filed in *Rustom*, the first reported case to accept a contention that federal courts held exclusive jurisdiction to consider claims under the PMPA, Gulf and Thrifty raised this jurisdictional issue. The Court of Appeal reversed the trial court, asserting that the California Superior Court lacked subject matter jurisdiction over the PMPA issues citing the recent California Court of Appeal decision, *Niakan, supra*, a decision based solely upon *Rustom* without further consideration or analysis of the issue (Appendix A, p.4).

In contrast, the Appellate Court for the State of Pennsylvania after much consideration and original analysis of the issue, rejected the *Rustom* decision and its logic, instead following *Ted's Tire* in its *Johnson* opinion. In the ten years since the PMPA was enacted, *Rustom*, and recently *Niakan*, are the only published decisions to hold that federal courts have exclusive jurisdiction over PMPA claims. Every other published opinion analysing issues under the PMPA has found or assumed concurrent jurisdiction, including *Lanham v. Amoco Oil Co.*, 481 F.Supp. 405 (D.Md. 1979) [remanding litigation to the State Court forum for trial on the merits]; *Johnson v. Mobil Oil Co., supra*, [rejecting *Rustom*,]; *Frankard v. Amoco Oil Co*, 116 Wis. 2d 254, 342 N.W.2d 247 (1983); *Walters v. Chevron U.S.A., Inc.*, 154 G.App., 636, 269 S.E.2d 495 (1980); *Bates v. Chevron U.S.A., Inc.*, 151 G.App. 544, 260 S.E.2d 367 (1979); *Ricco v. Shell Oil Co.*, 180 N.J.S. 399, 434 A.2d 1151 (1981); and *DeCosta's Automotive, Inc., v. Birchwood Plaza Shell, Inc.*, 482 N.Y.S. 2d 832 (1984).

C. The Court of Appeals Reversal Based Only Upon the Issue of Jurisdiction in Contravention of Title 28, United States Code § 1447(d).

Although the District Court had remanded this case twice and the Ninth Circuit Court of Appeal had dismissed Defendant's Appeal of Remand, and in addition

Defendant's Petition for Writ of Mandamus, the California Court of Appeal reversed judgment for the dealers on jurisdictional grounds.

> Title 28 of the United States Code § 1447(d) provides: "An order remanding a case to the state court from which it was removed is not reviewable on appeal or otherwise. . . ."

The effect of Title 28 United States Code § 1447(d) was plainly stated in the often cited case of *Chandler v. O'Brien*, 445 F.2d 1045 (10th Circuit 1971), cert. denied, 405 U.S. 964, as follows:

> "Thus so far as the question of a forum in which a case is to be litigated is concerned, the determination of a federal district court that a case is not removable and remanding it to the state court is final."

The present action was removed not once, but on two separate occasions to the United States district court. On both occasions, the action was remanded because after careful review of the issue, the United States district court determined that there did not exist a separate and independent controversy as to Thrifty and accordingly, the proper forum for the dispute was in the state court. The second remand order was directly appealed to the Ninth Circuit Court of Appeal. That Appeal was dismissed, the Ninth Circuit Court of Appeal citing *Thermatron, supra,* wherein, this Court stated as follows:

> "There is no doubt that in order to prevent delay in the trial of remanded cases by protracted litigation of jurisdictional issues (citation omitted) *Congress immunized from all forms of appellate review any remand order issued on the grounds specified in § 1447(c),* whether or not that order might be deemed erroneous by an Appellate Court." (Emphasis Added) *Thermatron, supra,* p.3 at 351.

Notwithstanding the remand orders, over seven years after this case was first filed, the issue of jurisdiction continues to be litigated.

Uniformly, published decisions of both the district and circuit courts in agreement with this Court have held that remand orders are immunized from all forms of appellate review, whether or not the court of appeal below considers the remand order erroneous as to the forum in which the dispute should be litigated.

A recent Ninth Circuit Court Opinion has reaffirmed this entire line of cases. In *Kunzi v. Pan American World Airways, Inc.*, 833 F.2d 1291 (9th Cir. 1987), the Ninth Circuit Court of Appeal stated:

> "Remand orders issued pursuant to 28 U.S.C. § 1447(c) and based on the grounds specified therein, ie., that removal was improvident and without jurisdiction, are immune from appellate review. (citations omitted). In such cases, 28 U.S.C. § 1447(d) acts as an *absolute* bar to review by appeal or mandamus. (citation omitted). This prohibition applies even if the district court's jurisdictional decision was erroneous." (Emphasis Added) Id. at 1293.

There are no published opinions wherein a state court of appeal is permitted to review and reverse the jurisdictional determination of the district court, and, in fact, all decisions on the issue hold that such an order is "immune" from review even if the appellate court believed the order to be in error.

REASONS FOR GRANTING THE WRIT

I. Congress Intended that both the State and Federal Courts have Jurisdiction over PMPA Claims.

The issue presented, whether state courts have jurisdiction to consider claims arising under the PMPA, 15 U.S.C. § 2801 et. seq. is one of great public importance in that the PMPA affects the nations second largest industry, the petroleum industry *and* provides the tens of thousands of retail gasoline station franchisees such as Petitioners whose very livelihood is held in the balance by the provisions of the PMPA, some measure of protection

from the abusive and arbitrary conduct to which the industry has subjected franchisees. The PMPA was enacted by Congress in 1978 to protect petroleum franchisees from unfair conduct on the part of the franchisor, and to eliminate the disparity of bargaining power between the two.

Various published decisions have commented on the remedial nature of the PMPA and Congress' intent to provide broad protection to service station franchisees against unfair termination or non-renewal by oil companies. As the Eighth Circuit noted in *Roberts v. Amoco Oil Company*, 740 F.2d 602, 604 (8th Cir. 1984):

> " 'In the nation's second largest industry, the major oil firms have the gasoline station dealers in virtual bondage, hinged on the constant threat that their short term contracts will not be renewed unless they submit to burdensome franchisor-imposed practices.
>
> * * *
>
> It is generally conceded that the gasoline station situation is almost hopeless and offers a prime example of the worst abuses in franchising.' "

The Senate Report reads as follows:

> "It is also important to note that often the reasonable expectations of the parties to a motor fuel franchise are that the relationship will be a continuing one. This expectation by the franchisee, in particular, is often the result of and fostered by, statements and actions of the franchisor. As a result, non-renewal of a motor fuel franchise relationship at the expiration of its term can be almost as punitive as termination of the franchise during its term. The reasonable expectations of the franchisee, rather than any definitive contract rights, are destroyed.
>
> * * *
>
> An essential requirement of the federal legislation is that the grounds for termination and non-renewal provided by the legislation not be so broad as to deny franchisees meaningful protection from arbitrary or discriminatory termination and non-

renewals or prevent fulfillment of the reasonable renewal expectations of franchisees." (S. Rep. No. 731, 95th Cong., 2d Sess. 18, *reprinted in* 1978 U.S. CODE CONG. & AD. NEWS 873, 874)

An announcement from this Court is necessary, at this time, to provide effective guidance to the tens of thousands of retail gasoline station franchisees and their legal counsel who currently or in the future must deal with claims under the PMPA. Pending this Court's interpretation and settlement of the jurisdictional issue, actions brought by dealers under the provisions of the PMPA both currently and in the future, face uncertainty. Many states, such as Pennsylvania may continue to rely on the language of *Ted's Tire, supra,* and *California ARCO Distributors, Inc., supra,* and file claims under the PMPA in state court and expend considerable financial resources and invest years of their lives seeking to establish their rights under the PMPA only to face reversal and dismissal of their actions based *only* on the issue of jurisdiction. Other courts, such as California, may follow *Rustom, supra,* and its progeny, *Niakan, supra,* leaving dealers with no forum in which to enforce rights granted them under the PMPA in conjunction with state law claims because district courts, such as the Ninth Circuit, do not exercise pendent party jurisdiction.

It would seem contrary to the remedial nature of this legislation to find that federal courts have exclusive jurisdiction thus forcing gasoline station dealers, a great portion of whom are located in extremely rural areas, to hire expensive big city attorneys in distant cities with little or no comprehension of the franchisee's business or the context in which his problems arise, to represent the dealer in federal district court regarding violations of the PMPA. In states such as California, the result adds insult to injury: the dealer seeking relief under both his state causes of action and the PMPA must therefore fight his battles in both the state and federal courts.

Furthermore, should state courts be found lacking in jurisdiction to hear claims arising under the PMPA, district courts will be burdened by a great deal more PMPA cases than perhaps presently contemplated. A major component of most petroleum franchise relationships, in addition to the gasoline supply and trademark agreements is a premises lease agreement. Unlawful detainer actions in connection therewith, are actions frequently brought by franchisors in terminating a franchise, and although currently brought in state courts, will of necessity be removed to federal district court. The dealer wishing to assert PMPA defenses to an unlawful detainer action by the franchisor would be required to raise those questions in the district court. Thus, the impact of exclusive federal jurisdiction would not be limited to dealers in that it will significantly and, it is contended, needlessly increase the work load of district courts.

The proponents of exclusive federal court jurisdiction over matters arising under PMPA take their cue from a single federal court opinion, that of *Rustom, supra,* in which the district court considered the jurisdictional issue in light of *Valenzuela v. Kraft, Inc.*, 739 F.2d 434 (9th Cir. 1984). As heretofore noted the appellate court's decision below following *Rustom,* is inconsistent with the express language of the statute, all other published federal and state case precedence, and the pronouncements of both this Court and the California Court of Appeal.

The court in *Valenzuela,* dealing with a similarily vague and ambiguous piece of legislation, Title VII of the Civil Rights Act held that in the absence of an explicit statutory directive, exclusive federal jurisdiction may be implied from the legislative history of the federal act. Exclusive jurisdiction over Title VII of the Civil Rights Act was determined to exist based on implications drawn from the statutory references to federal procedure rules

and from an absence in the legislative history of any reference to potential state court jurisdiction. (*Valenzuela, supra,* 739 F.2d at 436.)

The district court in *Rustom,* analogizing the jurisdictional language in the PMPA to that of Title VII of the Civil Rights Act, concluded that the same factors were present in the PMPA, in the same degree. (*Rustom, supra,* p. 3 at 212-213). However, a careful analysis of the *Rustom* courts reasoning reveals that it is erroneous because it rests primarily upon the improper application of guidelines announced in *Valenzuela* to the factors present or more accurately, absent from the PMPA.

In *Valenzuela,* the Ninth Circuit reasoned that federal courts have exclusive jurisdiction over Title VII for two reasons. First, the legislative history of Title VII refers to enforcement in federal courts but does not refer to enforcement in state courts. Second, Title VII contains references to procedural mechanisms available only in the federal court system. Similarly, according to *Rustom,* the legislative history of the PMPA refers only to enforcement of actions brought in federal court and the PMPA incorporates substantive standards found in the Federal Rules of Civil Procedure. A closer examination of the PMPA reveals that the court's reasoning in *Valenzuela,* does not apply to the PMPA.

In fact, a much better analogy could be made to the jurisdictional language of any number of other federal acts, including the Federal Racketeer Influenced and Corrupt Practices Act or the Labor Management Relations Act of 1947. The California Supreme Court in its Decision in *Cianci, supra,* reasoned that concurrent jurisdiction exists in actions involving the Federal Racketeer Influenced and Corrupt Practices Act citing and relying upon *California ARCO Distributors, Inc.,* and *Ted's Tire,* as examples of actions involving statutes, (in each instance the

PMPA), wherein concurrent jurisdiction existed. The California Supreme Court in *Cianci, supra,* said:

> " 'Congress, . . . may confine jurisdiction to the federal courts either explicitly or implicitly. Thus, the presumption of concurrent jurisdiction *can be rebutted by an explicit statutory directive, by unmistakeable implication from legislative history, or by clear incompatibility between the state court jurisdiction and federal interest.*' (citation omitted). Put otherwise *'the presumption is that jurisdiction is concurrent, and some strong showing of need for exclusive jurisdiction is required to overcome that presumption.'* " (Citation omitted) (emphasis added) (Id. at page 910).

The Court in *Valenzuela,* began its analysis by noting that while Title VII made affirmative references to actions being brought in federal court without mentioning actions brought in state court, that fact was not determinative of jurisdiction. (739 F.2d at 436).

> "It is black-letter law, however, that the mere grant of jurisdiction to a federal court does not operate to oust the state court from concurrent jurisdiction over the cause of action." (*Gulf OffShore Corp. v. Mobil Oil Corp.*, 453 U.S. 473, 479, 101 S.Ct. 2870, 2875-2876, 69 L.Ed.2d 784 (1981).

Thus, the PMPA's enforcement provision at 2805: "such action may be brought without regard to the amount in controversy, in the district court . . . ", cannot provide the explicit statutory directive of exclusive jurisdiction necessary to rebutt the presumption of concurrent jurisdiction. (Id. at 478, 101 S.Ct. at 2875).

Additionally, an examination of the PMPA reveals that there *is no* statutory directive providing for exclusive federal jurisdiction. Indeed, the statute is expressly contrary to any conclusion that exclusive jurisdiction exists thereunder.

Pursuant to 15 U.S.C. § 2806, governing the relationship between the statutory provisions of the PMPA, and State and local laws, Congress expressly authorized and

empowered State legislatures to enact statutes which would be "the same as" the PMPA, as they might relate to termination and non-renewal of franchise agreements. Specifically, 15 U.S.C. § 2806(a) provides, in part:

> "To the extent that any provision of this sub-chapter applies to the termination . . . of any franchise, or to the non-renewal of any franchise relationship, no state . . . may adopt, enforce or continue in effect . . . any law or regulation . . . unless such provision of such law relationship is *the same as*, the applicable provisions of this chapter."

Congress has expressly empowered states to enact statutes the "same as" the PMPA and therefor authorized petroleum termination dispute litigation in state tribunals. Clearly congress intended that there exist a uniform body of statutory law, but not that disputes be litigated exclusively in federal court whether litigation be filed under the PMPA or parallel state statutes. To conclude, that the PMPA vests exclusive jurisdiction in federal courts results in the absurd situation that state and federal courts have concurrent jurisdiction in substance but not in form. In other words, state courts can act under laws that are the "same as" the PMPA and must apply federal standards, but can only do so under state legislation. Such a conclusion would frustrate the remedial purposes of the PMPA and is not supported by the plain language of the PMPA.

To the contrary, the enforcement provisions of 15 U.S.C. § 2805 et. seq., provide that a PMPA claim "may be brought" in federal court. Use of the discretionary term "may" is a clear legislative proclaimation that concurrent jurisdiction shall exist. In *Dowd Box Co. v. Courtney*, 368 U.S. 502; 82 S.Ct. 519 (1962) the Supreme Court was asked to decide whether the Labor Management Relations Act of 1947 granted exclusive jurisdiction to federal courts.

Section 301(a) of the Act provided that actions for violations of the law "*may* be brought in any district court in the United States. . . .without respect to the amount in controversy." The court, upon examination of the statute stated that this language "simply gives the federal district court jurisdiction over suits for violation of certain unspecified types of contracts" and that "it does not state or even suggest that federal jurisidiction shall be exclusive." It provides suits of the kind described "may" be brought in the federal district courts, not that they must be." (Id. at 506).

The Court in *Valenzuela*, however relied on "the absence of reference [in the legislative history] to the state courts combined with Congress' affirmative references to the federal courts . . . " (*Valenzuela, supra*, p. 19 at 436.) Similarly, the *Rustom* Court analogized that the legislative history of the PMPA "refer[s] only to the maintenance of an action under the PMPA in federal court . . . " (*Rustom, supra*, at 618 F.Supp. at 212).

However, the legislative history is in fact silent in connection with any stated need for exclusive federal jurisdiction over actions filed pursuant to the PMPA. A close look at the legislative history of this Act reveals that there are only passing references to enforcement in federal courts of PMPA claims and in fact demonstrates there exists neither "an unmistakable implication from legislative history" nor a "clear incompatibility between state court jurisdiction and federal interests" in favor of exclusive federal jurisdiction.

While the senates report of the PMPA mentions, in its summary of major provisions, that the "provisions of Title 15 are enforceable by private civil actions in the U.S. District Court." At no time does the legislative history provide that such action "*shall*" or "*must*" be brought in the U.S. District Court. Indeed, in the more detailed section by section analysis of the PMPA, the senate report

merely refers to such actions being brought in "the courts" whether for equitable relief or monetary damages.

> "*The courts* are authorized to grant equitable relief necessary to remedy the effects of any violation of the requirements of the legislation. *The courts* are instructed to grant preliminary and injunctive relief . . . *the court* is barred from issuing permanent injunctive relief if . . . " (Emphasis Added). [S. Rep. No. 731, 95th Cong. 2d Sess. 40, *reprinted in* 1978 U.S. CODE CONG. & AD. NEWS 873, 879].

Conspicuously absent from this detailed, section by section review, is any reference to federal or U.S. District Courts. Instead, the generic, all encompassing term "the courts" is used.

The second prong of the *Valenzuela* reasoning relied on statutory provisions in Title VII of the Civil Rights Act which required the Courts to apply *federal* procedural rules relating to such matters as requests for injunctive relief. It is doubtful whether Congress has the constitutional power to require *state courts* to follow such rules. (*Valenzuela, supra,* p. 19 at 436.)

For example, Title VII of the Civil Rights Act requires preliminary injunctions to be issued "in accordance with Rule 65 of the Federal Rules of Civil Procedure." (739 F.2d at 435-36). Furthermore, Courts are required to hear Title VII cases "at the earliest practicable date and to cause such cases to be in every way expedited." (Id. at 436). Because the Valenzuela court did not believe Congress would attempt "to regulate the procedures and priorities of the State Courts" it concluded that Title VII contained an unmistakeable implication to vest federal courts with exclusive jurisdiction.

Unlike Title VII, however, the PMPA does not attempt to regulate court procedure. While the PMPA provides that a franchisee who prevails on an action

thereunder is entitled to actual damages "consistent with the Federal Rules of Civil Procedure . . . " (15 U.S.C. § 2805(d)(1), it is unclear what that reference to the federal rules means. *Rustom* gives no indication of the meaning and there is no reported decision which construes the provision. By implication, the conclusion would be that damages are to be awarded consistent with the Federal Rules of Civil Procedure, which state court tribunals are clearly authorized and capable of doing.

Rustom also relies upon the fact that the PMPA adopts the second circuit standard for granting preliminary injunctions. But adopting the standard does not incorporate Rule 65 into the PMPA. In fact, the standard incorporated into the PMPA departs from the standard followed by federal courts generally and the Ninth Circuit in particular. (See: *Moody v. Amoco Oil Company*, 734 F.2d 1200, 1216 (7th Circuit, 1984).

The PMPA standards for injunctive relief depart from the general equity relief standard in that the "equity standard requires a balance of hardship 'decidedly' in favor of the party seeking the injunction, while the standard in the act only requires that, on balance, the franchisee suffer comparitively more hardship than the franchisor." (*Guilderhus v. Amoco Oil Co.*, 470 F. Supp. 1302, 1304 (D. Mn. 1979).

Contrary to the assertion in *Rustom*, the Ninth Circuit in particular, does not apply the PMPA standard for injunctive relief. In the Ninth Circuit, a preliminary injunction requires the showing of either (1) a combination of probable success on the merits and probability of irreparable injury or (2) serious questions are raised and the balance of hardship tips sharply in its favor. (See: *Los Angeles Memorial Colliseum Commission v. National Football League*, 634 F.2d 1197, 1201 (9th Cir. 1980)).

While Congress may not have power to require state courts to follow the procedural rules of Title VII, it does have the power to compel state courts to follow substantive law based upon federal standards as contained in the PMPA. (See: *Emerson v. J.F. Shay Co.*, 76 Cal.App.3d 579, 589 (1978)).

Clearly, Congress had and did exercise the power to require state courts to grant preliminary injunctions based upon a federal standard and to award actual damages consistent with Federal Rules of Civil Procedure. Those are not procedural rules, but are provided merely as guidelines for trial courts to follow and cannot give rise to state and federal court jurisdictional incompatibility such as that created by the language of the Civil Rights Act, in *Valenzuela*.

The *Rustom* courts analogy between the jurisdictional language of the PMPA and that of Title VII upon closer examination is not only lacking in factual underpining, but is illogical. While Congress might justifiably have been concerned that the protections intended when enacting the Civil Rights Act would *not* be enforced at the state court level, that is, by the very states whose long history of discrimination made necessary the legislation; when Congress enacted the PMPA, it acted merely to protect franchisees and end the disparity of bargaining power between the franchisor and the franchisee. Congress also intended to establish a uniformity of franchise termination rules as evidenced by the limited preemption language of PMPA, 15 U.S.C. § 2806(a). To conclude otherwise, that state courts can hear and determine disputes arising out of terminations of petroleum franchises by applying state law and federal authority, but not under the PMPA pursuant to concurrent jurisdiction, makes a judicial mockery out of clear legislative scheme. That is, to insure only a uniform body of rules or laws

governing franchise termination, and not a requirement that disputes be litigated only in federal courts. This Court, should find as the Court in *Johnson* did:

> "We perceive no incompatibility between state court jurisdiction in promoting Congress' intent to protect the needs of both franchisees and franchisors, to remedy disparity and bargaining power and to prevent arbitrary or discriminitory termination or nonrenewal. For the foregoing reasons, we find that a state court enjoys concurrent jurisdiction over claims brought under the PMPA." (citations omitted). (528 A.2d 164)

II. Remand Orders are binding decisions on the Courts of California as to the forum in which the action is to be litigated.

The appellate decision herein, reversing the trial court judgment in favor of Plaintiffs on purely jurisdictional grounds, substitutes the appellate courts opinion as to the proper jurisdictional forum. Therefore, this Court's guidance is requested to ascertain the correct application of 28 U.S.C. § 1447(d) to this possibly ambiguous and unforeseen circumstance. The district court herein, not once, but twice, denied possession of the matter and the Ninth Circuit Court of Appeal subsequently dismissed an appeal citing 28 U.S.C. § 1447(d). The petitioners thereafter, succeeded on the merits in the state court, *only* to be met by reversal in the Court of Appeal, based only on its determination that the United States district court was the proper forum. Although it did so without directly reversing, vacating or modifying that decision, Petitioners herein contend that nevertheless this constitutes a prohibited review by an appellate court of a remand order.

Judge Hatter's Order of Remand based upon "the undisputed material facts and underlying law" (Memorandum Opinion, App. D, p.15) is binding under the principals of 28 U.S.C. § 1447(d), and is not subject to review by appeal or otherwise, either directly or indirectly:

> "The decision of the district court that the case does not envoke the federal jurisdiction and must be remanded *precludes further litigation of the issue of the forum in which the removed case is to be litigated.* (Citation omitted) (*Rath Packing Co. v. Becker*, 530 F.2d 1295, at 1303 (9th Cir. 1975).)

Explaining the logic behind this rule of law, the Court in the frequently cited case of *Missouri Pacific Railroad Company v. Fitzgerald*, 160 U.S. 556, 583, 16 S.Ct. 389 (1896) stated:

> "So far as the mere question of the forum was concerned, Congress was manifestly of opinion that determination of the circuit court that jurisdiction could not be maintained should be final, *since it would be an uncalled for hardship to subject the party who, not having sought the jurisdiction of the circuit court, succeeded on the merits in the state court, to the risk of the reversal of his judgment,* not because of error supervening on the trial, but because of a disputed question of diverse citizenship had been erroneously decided by the circuit court . . . "
> (*Missouri, supra,* at 583)

That the proceedings in state court following a remand order are binding upon state courts of appeal and the highest court of the state, was further spelled out in *Missouri* as follows:

> "A state court cannot be held to have decided against a federal right when it is the circuit court, and not the state court, which has denied its possession . . . as under the statute a remanding order of the circuit court is not reviewable by this Court on Appeal or writ of error from or to that Court, *so it would seem to follow that it cannot be reviewed on writ of error to a state*

> *court,* the prohibition being that *'no appeal or writ of error from the decision of the circuit court remanding such cause shall be allowed . . . "* (*Missouri, supra,* at 583).

The very fact that the district court specifically assumed jurisdiction of this matter for purposes of making conclusory findings on material issues related directly to the court's jurisdiction, demands a conclusion that concurrent jurisdiction over PMPA claims exist, and that in fact, the District Court for the Central District of California has found concurrent jurisdiction exists as to Petitioner's claims. The Court of Appeals determination to the contrary, that jurisdiction lies exclusively in the federal courts, is therefor at odds both with the prohibition of § 1447(d) and with the specific determination by the district court of the jurisdictional issue raised by Gulf. The District Court's assumption of jurisdiction *could only occur upon the basis that it found concurrent jurisdiction to exist because "if it is determined that the removed case is one over which the federal courts have exclusive jurisdiction, the federal court cannot hear the action."* (Federal Practice and Procedures, Wright, Miller, Cooper, § 3722 at p. 284). As held by this Court in *Lambert Run Coal Company v. Baltimore and Ohio Railroad Company,* 258 U.S. 377; 42 S.Ct. 349 (1922) the federal district court *must dismiss* a case that is within its exclusive jurisdiction because when the state court from which the case is removed did not have jurisdiction over the claims the federal court *cannot acquire any derivative jurisdiction,* and therefore:

> "The circuit court of appeals, in remanding the cause to the district court, *should have directed a dismissal for want of jurisdiction . . . "* (Id. at page 383).

The determination of the court of appeal reversing judgment for Petitioners on jurisdictional grounds, constituted a prohibited review of the order of remand. If the Ninth Circuit Court of Appeal would not permit direct review of the remand order and the determination that

jurisdiction was properly in the state court, clearly a collateral review by the California Court of Appeal must be prohibited also. Where this Court has prohibited itself from review of a state court proceeding following remand, including that of the highest court of the state, it would seem to follow that a state court of appeal is prohibited also. As annunciated in *Browning v. Navarro*, 743 F.2d 1069 (5th Cir. 1984):

> "The United States Supreme Court has held that an order of a district court remanding a cause to the state court is not reviewable by the Supreme Court on appeal from a final judgment in the highest Court of this state. (citations omitted).
> 'Even on review in the Supreme Court of a *state court proceeding following remand the propriety of the remand, in a non-civil rights case, cannot be questioned.*" (*Browning v. Navarro, supra*, at 1177).

The Court of Appeals reversal of Judgment for Petitioners on jurisdictional grounds although done without directly questioning the propriety of the remand, constitutes its determination collaterally that jurisdiction was properly in the federal court, a decision petitioners contend *was* a form of a prohibited appellate review of the remand order.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that this Court should grant its Writ of Certiorari to review the Decision of the California Court of Appeal in this case. Intervention by this Court is necessary at this time to resolve the conflict of decisions between both the courts of appeal and the district courts and more importantly by reason that the conflict presented relates to an important question of federal law which has not been,

but should be settled by this Court: that is, the proper forum for actions proceeding under the PMPA.

Moreover, it is respectfully requested that this Court clarify that its many decisions pursuant to 28 U.S.C. § 1447(d) prohibiting review of a remand order are applicable at the state court level, and thus orders of remand are binding decisions upon the issue of jurisdiction.

It is respectfully submitted that the proper development of law in this area of great public importance requires the issue of jurisdiction under the PMPA to be answered at this time, and further, that a state court directly or indirectly substituting its opinion as to the proper forum of an action where that issue has previously been decided by a federal court erodes proper federal control of its jurisdiction pursuant to 1447(d) thus requiring this courts intervention.

KENNETH P. ROBERTS
A PROFESSIONAL LAW CORPORATION

By: /s/ Kenneth P. Roberts
Kenneth P. Roberts

Dated: October 17, 1988

APPENDIX A

NOT FOR PUBLICATION

IN THE COURT OF APPEAL OF THE
STATE OF CALIFORNIA
SECOND APPELLATE DISTRICT
DIVISION TWO

JACK ABADJIAN, MARK BALL, JOSEPH BROWN, BEN CESON, JOHN EGHENIAN, BRAD MAY, NASSIR MAZAREI, DONALD PROUSE, AL ROSENSTEIN, ARAM SHISHMANIAN, JOE SMIDERLE, AND STEPHEN WEBBER, *Plaintiffs and Respondents,* *v.* GULF OIL CORPORATION, a Pennsylvania corporation; THRIFTY OIL CO., a California corporation, *Defendants and Appellants.*	B 016989 (Super. Ct. No. C 377024 Cons. with case Nos. C 399330, 406851, 406852, 406854, 406855, 406856, 406857, 406858, 407545, 409749, 410941 and 410942.)
BRAD MAY and ARAM SHISHMANIAN, *Plaintiffs-Cross-Appellants,* *v.* GULF OIL CORPORATION, a Pennsylvania corporation; THRIFTY OIL CO., a California corporation, *Defendants-Cross-Respondents.*	

Court of Appeals
Second District
Filed
May 8 - 1988
Robert M. Wilson
Clerk

In this protracted dispute among two oil companies and twelve gasoline station operators, the trial court ruled in favor of the gas station dealers under the federal Petroleum Marketing Practices Act, 15 U.S.C. section 2801 et seq. (hereafter "PMPA"). We reverse

The essential facts are undisputed. Prior to 1978 Gulf Oil Corporation leased some 300 gas stations in its Los Angeles Division to dealers, and by separate contracts supplied them with gasoline. In July 1978, having concluded that business was not profitable in Southern California, Gulf determined to sell its Los Angeles Division assets. In 1980 Thrifty Oil Company offered to buy all of Gulf's Los Angeles Division service stations. A letter contract dated September 30, 1980, sealed the transaction.

Paragraph 18, subparagraph (c) of the contract stated that Gulf and Thrifty agreed to abide by the provisions of the PMPA, insofar as they were applicable. Thrifty and Gulf swiftly fell into contention concerning what was due to the dealers under the PMPA.

Gulf sent copies of a letter dated November 24, 1980, to all of its Los Angeles Division dealers, stating in part: "[Y]ou will be given notification and the offer required by the Petroleum Marketing Practice Act to acquire the station yourself." Thrifty protested, disputing that the PMPA gave the dealers a right of first refusal. Consequently, Gulf asked Thrifty to delay the close of escrow in order to sort out the various parties' rights and obligations.

In August 1981, the dealers filed this action against Thrifty and Gulf in superior court, alleging in their first cause of action that the proposed sale was a conspiracy to

deny them their right of first refusal under the PMPA, and seeking a declaration of rights. Gulf cross-complained for declaratory relief. Thrifty sued Gulf for breach of the purchase agreement; the court granted Gulf's petition to compel arbitration of Thrifty's cross-complaint.

After Gulf and Thrifty twice unsuccessfully attempted to remove the case to federal court (*Abadjian* v. *Gulf Oil Corp.* (C.D. Cal. 1984) 602 F.Supp. 874, 877), the dealers filed for summary adjudication of issues on August 20, 1984. On December 10, 1984, the trial court ruled in favor of the dealers: "The September 30, 1980 agreement between Defendants was an event and an action that gave to each moving Plaintiff a right of first refusal to purchase Gulf's interest in their respective service stations. [§ Under the [PMPA] Defendant Gulf was obligated to offer each moving plaintiff the right as aforesaid at least 45 days prior to the agreed upon closing date of the Gulf sale to Thrifty (May 1981)."

On September 11, 1985, the trial court granted Gulf's request to sever the first cause of action from the rest of the complaint. The only remaining issue on that cause of action was the price to be offered to each dealer for his gas station. The parties stipulated to the facts from which the court determined the purchase prices. Thrifty and Gulf appealed from the resulting judgment. Thrifty also appealed from the order compelling arbitration.

Two dealers, Brad May and Aram Shishmanian, cross-appealed. May complained that he was entitled to purchase all, rather than just a portion of the property Gulf transferred to Thrifty. Shishmanian objected to being

required to pay for improvements Gulf made to his station after the action was filed, but before judgment.

In addition, the court awarded the dealers over $200,000 in costs and attorney fees. Gulf appealed from this award. All appeals were consolidated. All other proceedings in the action were stayed pending resolution of this appeal.

Thrifty and Gulf assert that the California superior court lacked subject matter jurisdiction over the PMPA issues, because Congress intended the federal courts to have exclusive jurisdiction under the PMPA. They are correct. (*Niakan* v. *Samaan* (1988) 199 Cal.App.3d 716.) Since the PMPA is enforceable only in the federal courts, the trial court erred in deciding the PMPA issues. This determination disposes of most of the issues on appeal, as well as the cross-appeals of May and Shishmanian. The dealers will have to be satisfied with prosecuting their state law causes of action.

The parties agree that the order granting attorney fees has no basis other than the PMPA. (15 U.S.C. § 2805, subd. (d)(1)(C).) Since we have held that the trial court lacked jurisdiction under the PMPA, it follows that the trial court lacked power to award attorney fees under the PMPA.

Finally, Thrifty contends that the trial court erred in compelling arbitration of its cross-complaint against Gulf. We agree.

Article 17 of the Gulf-Thrifty contract provides remedies for each party should the other breach the purchase agreement. Subdivision (a) states that if Thrifty

breaches, Gulf may retain one quarter of the earnest money as liquidated damages, "provided, however, Gulf may elect not to accept the earnest-money deposit as liquidated damages, and may instead, *avail itself of all rights, powers and remedies now or hereafter existing at law or at equity, by statute or otherwise, including the right of specific performance.*" (Emphasis added.) The emphasized portion of subdivision (a) permits Gulf to go to court to pursue legal and equitable remedies.

Subdivision (b) states that if Gulf breaches, Thrifty "may elect not to demand the return of the earnest money deposit as its sole remedy for Gulf's breach and may instead, institute arbitration proceedings against Gulf pursuant to paragraph 19(e) for the return of its deposit and such damages (in an amount which shall not, in any event, exceed One Million Dollars ($1,000,000)) as may be attributable to such breach of the agreement by Gulf, or at Buyer's option *avail itself of all rights, powers and remedies now or hereafter existing at law or at equity, by statute or otherwise, including the right to specific performance.*" (Emphasis added.)

The emphasized language in subdivision (b) is identical to the emphasized language in subdivision (a). Subdivision (b) states that Thrifty has a choice of arbitration or legal action if Gulf defaults, just as subdivision (a) gives Gulf the choice of liquidated damages or legal action if Thrifty defaults. Equity as well as symmetry and logic demands it. Therefore, the trial court erred when it ordered Thrifty and Gulf into arbitration. The choice was Thrifty's.

The judgment is reversed and remanded with instructions to dismiss the first cause of action. The award of attorney fees is reversed. The order compelling arbitration between Thrifty and Gulf is reversed. The parties are to bear their own costs on appeal.

NOT FOR PUBLICATION

/s/ Roth, P.J.
ROTH

We concur:

/s/ Gates, J.
GATES

/s/ Fukuto, J.
FUKUTO

APPENDIX B

ORDER DENYING REVIEW

AFTER JUDGMENT BY THE COURT OF APPEAL

2nd District, Division 2, No. B018989
S006012

IN THE SUPREME COURT
OF THE STATE OF CALIFORNIA

IN BANK

SUPREME COURT
FILED
JUL 20, 1988
Laurence P. Gill, Clerk
Deputy

ABADJIAN et al., Respondents,
v.
GULF OIL CORP. et. al., Appellants.
and related cases

Respondents' petition for review DENIED.

Mosk, J., is of the opinion the petition should be granted.

KAUFMAN
Acting Chief Justice

APPENDIX C

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

JACK ABADJIAN, MARK BALL, JOSEPH BROWN, BEN CESON, JOHN EGHENIAN, BRAD MAY, NASSIR MAZAREI, DONALD PROUSE, AL ROSENSTEIN, HERB SCHWEIZER, ARAM SHISHMANIAN, JOE SMIDERLE, AND STEPHEN WEBBER, *Plaintiffs,* *v.* GULF OIL CORPORATION, a Pennsylvania corporation; GULF OIL REAL ESTATE DEVELOPMENT CORPORATION, a wholly owned subsidiary of GULF OIL CORPORATION; ROBERT W. BALDWIN; J. ROGER KEMPLE; TOM OTJEN; JOE MAYERS; GEORGE WILLIAMS; OTTO MEYER; GLEN R. JENSEN, THRIFTY OIL CO., a California corporation; and DOES 1 through 100, inclusive, *Defendants.* AND RELATED CROSS-CLAIMS AND CONSOLIDATED ACTIONS	CV 83-6686: TJH(Px) MEMORANDUM OPINION (Filed March 13, 1984)

This cause of action arises from the decision of Gulf Oil Corporation ("Gulf") to withdraw from the Southern California gasoline market and to sell its service stations in the area to Thrifty Oil Company ("Thrifty"). With the exception of plaintiff Herb Schweizer,[1] each plaintiff

occupies and operates a gasoline service station under a lease originally executed with Gulf before June, 1978. Plaintiffs can be classified into two subgroups according to the marketing plan they have adopted from Gulf. Some of the plaintiffs oeprate their leased service stations under a single supply agreement with Gulf and market fuel purchased from the company using its trademark, trade name and symbol.[2] The remaining plaintiffs operate "unbranded" service stations pursuant to several continuous supply agreements with Gulf. All these stations were included in the service stations Gulf agreed to sell to Thrifty.

The "unbranded" operators allegedly discontinued their use of Gulf trademarks and symbols on the suggestion of the company. Plaintiffs contend that because Gulf had difficulty competing in the Southern California market it decided to create a debranding program for its independent operators. The first amended complaint alleges that in January, 1978, Gulf called a general operators meeting which several plaintiffs attended. (See First Amended Complaint, §14.) According to plaintiffs, Gulf anounced a new marketing program at this meeting, whereby branded Gulf service station operators would debrand their stations and sell Gulf motor fuel without the benefit of trademarks and logos. (See First Amended Complaint, §14.) In exchange, Gulf allegedly promised the proposed debranded operators an increased supply of motor fuel at reduced rates, if they agreed to the new marketing plan. *Id.* Consequently, several operators agreed to adopt this plan.

Following the announced debranding program, Gulf prepared to sell its assets in the Southern California

market to another oil distributor. In 1979, Gulf initially planned to see all of its assets located in the Los Angeles Division, which covered the states of Arizona, California, and Nevada, as part of a "package deal". The available package included Gulf's asphalt plants, its Santa Fe Springs Refinery, and more than three hundred service stations, including the stations leased to the plaintiffs. By September, 1980, Gulf had accepted an offer from Thrifty covering the leased service stations (rather than the entire "package deal") and the parties executed a written agreement (the "1980 Letter Agreement") acknowledging the proposed transaction.

After Gulf notified the independent operators about the Thrifty sale, the relationship between Gulf and the independent operators deteriorated. In August 1981, plaintiffs filed their original complaint in state court alleging several violations of state and federal law. Most of the counts in the complaint were premised on state law. The state counts involved claims for fraud, violations of the California Franchise Investment Law, estoppel, unfair competition and requests for declaratory and injunctive relief arising from an alleged conspiracy between Gulf and Thrifty to violate plaintiffs' rights under both state and federal law. Thrifty sought unlawful detainer actions against the leasees as their new landlord.

The alleged federal question jurisdiction arises from plaintiffs' claim that the September, 1980, sales agreement between Thrifty and Gulf terminated plaintiffs' franchises and obligated Gulf, under the provisions of the Petroleum Marketing Practices Act (the "PMPA"), 15 U.S.C. § 2801 *et. seq.*, to offer plaintiffs first refusal rights before closing the Thrifty sale. In opposition, Gulf argues:

(1) whether there is a franchise relationship with each plaintiff, and (2) if yes, then the franchise relationship has been assigned to Thrifty as part of the sale of assets transaction. Thus, the defendants claim none of plaintiffs' rights have been violated under the PMPA.

In November, 1981, defendants first petitioned for removal to federal court asserting that the amended state complaint alleged a federal question under the PMPA. However, this Court remanded the entire case to state court for the following reasons. First, the Court found jurisdiction over Thrifty unattainable under the Act since Thrifty is not plaintiffs' franchisor. Secondly, the Court found jurisdiction over the claims against Gulf could not be maintained because it could not sever Gulf's claims from the nonremovable claims against Thrifty. Finally, the Court remanded on the grounds that the Ninth Circuit does not recognize pendent party jurisdiction. *See Aldinger v. Howard*, 513 F.2d (9th Cir. 1975), *aff'd*. 427 U.S. 1 (1976).

Defendants now seek a second opportunity at removal. This most recent removal petition, filed October 17, 1983, contends that plaintiffs' October, 1983, filing of a motion for summary adjudication in state court under the PMPA justifies removal to federal court. At the subsequent removal hearing, the Court requested additional information concerning the merits of defendants' claim that Thrifty is a franchisor as contemplated under the Act. Defendants submit the Santa Fe Springs Refinery Contract ("SFSR Contract"), which assigns Gulf's rights in supply agreements with independent dealer-operators to Thrifty, as proof supporting their renewed claim of federal jurisdiction of the counts relating to Thrifty. Thus,

the Court faces a reconsideration of its earlier remand order and addresses the issue of defendant's timeliness in this second removal petition.

Timeliness of the Present Removal Petition

Plaintiffs are generally considered the masters of their complaints and free to decide the forum in which to bring an action. However, Congress has provided a mechanism for a defendant to gain access to a federal tribunal though the plaintiff brings his action in state court. Under the removal statute, a defendant need only show that the removal petition is timely filed and that a federal court has original jurisdiction over the action. 28 U.S.C. § §1446(b) and 1446(a).

Section 1446(b) sets forth a thirty day limitation for filing a petition once a basis for removability exists. Here, plaintiffs assert that defendants second removal petition, filed October 17, 1983, is untimely and should relate back to the filing date for the original complaint, not the date when plaintiffs filed for summary adjudication in state court. Thus, plaintiffs argue this Court lacks jurisdiction over the petition.

However, the statutory time limit for removal petitions is merely a "formal and modal requirement"; it is not jurisdictional. *See Fristoe v. Reynolds Metal Co.*, 615 F2d 1209, 1212 (9th Cir. 1980); 1A *Moore's Federal Practice and Procedure* ¶ 0.168[3.-5] (1974 ed.). Even if the Court adopted the relation back argument, plaintiffs would be estopped from objecting to the timeliness of the removal petition, since defendants' present petition for removal is based on plaintiffs' own October 5, 1983 motion for summary adjudication of actions arising "under PMPA." *Id.*

At a minimum, the court may find that plaintiffs most recent summary judgment motion extends the time period for defendants to file a removal petition. Moreover, the plain language of the removal statute provides that the thirty day period commences after defendants receive "a copy of an amended pleading, *motion*, order or other paper" from which removability can be ascertained. § 1446(b) (emphasis added). Thus, defendants' petition falls within the necessary time limitation.

Theories for Removability

In a removal action action involving multiple defendants, movants can invoke several theories to support federal jurisdiction. They can remove on the grounds that the cause of action arises under federal law, or they can rely on diversity of citizenship, or they can remove under the pendent party theory. 28 U.S.C. § 1441; *See also Aldinger v. Howard*, 513 F.2d 1257 (9th Cir. 1975), *aff'd.*, 427 U.S. 1 (1976); *Schroeder v. TransWorld Airlines, Inc.*, 702 F.2d 189, 191 (9th Cir. 1983). In the present action, diversity and pendent party jurisdiction are unavailable to these defendants. The complaint indicates that several defendants, including Thrifty, are California residents or citizens, thus, complete diversity does not exist as to them. In addition, the Ninth Circuit strongly disapproves of pendent party jurisdiction unless the parties can show an independent ground of jurisdiction exists over the claims against against the pendent party. *See, Benson v. U.S. Small Business Administration*, 644 F.2d 1366, 1367 (9th Cir. 1981); *Libby, McNeil, and Libby v. City National Bank*, 592 F.2d 504, 510 (9th Cir. 1978); *Avala v. United States*, 550 F.2d 1196 (9th Cir. 1977). Therefore, this

Court's decision on removability turns on the federal character of the claims against Thrifty.[3]

The Merits of Federal Jurisdiction in this Case

Federal jurisdiction under the PMPA must be decided on the merits because the jurisdictional issue and substantive issues are so intertwined with the resolution of crucial facts. *Sun Valley Gasoline, Inc. v. Ernst Enterprises, Inc.*, 711 F.2d 138, 139 (9th Cir. 1983). In PMPA cases, the Ninth Circuit has instructed the district courts to avoid dismissal for lack of subject matter jurisdiction solely on the face of the pleadings. *Id.* at 139-40. Relying on the *Sun Valley* holding, defendants contend the Ninth Circuit has prohibited jurisdictional fact finding under PMPA without a trial on the merits. Thus, they argue that by asserting a federal claim against Thrifty on the face of their papers plaintiffs have created a jurisdictional issue which must be resolved at trial.

This Court does not read the holding of *Sun Valley* as broadly as defendants wish. In ruling on a challenge to subject matter jurisdiction, a district court is ordinarily free to hear evidence regarding jurisdiction before trial, resolving factual disputes where necessary. *Augustine v. United States*, 704 F.2d 1074, 1077 (9th Cir. 1983); *Thornhill Publishing Co. v. General Telephone and Electronics Corp.*, 594 F.2d 730, 733 (9th Cir. 979). Courts *have been careful to distinguish* between the *standards* of jurisdictional analysis *under motions to dismiss and jurisdictional fact finding in summary judgment proceedings. Augustine*, 704 F.2d at 733-34. In *Sun Valley*, the district court dismissed, pursuant to Fed. R. Civ. P. 12(h)(3), ten counts of the

complaint that alleged PMPA violations on the grounds defendant noted the absence in the complaint of an allegation regarding defendants ability to use a refiner's trademark, commonly referred to as "branding authority." *Sun Valley*, 711 F.2d at 139. Later, the court of appeals refused to uphold the dismissal of the PMPA claims without specific jurisdictional fact finding by the court under the Act. *Id.* at 141. However, the court of appeals left open the district court's ability to resolve PMPA jurisdictional questions in summary judgment proceedings by noting, "[w]e do not exclude the possibility that these claims may be suitable for Rule 56 disposition." *Id.*

In an exemplary pretrial proceeding where the party seeking dismissal prevailed, the court had an opportunity to develop substantial evidence on the interrelated jurisdictional and factual issues under the rigorous standards of Rule 56. *See Thornhill*, 594 F.2d at 735-36 (Sherman Act case in which Ninth Circuit affirmed summary judgment on the issue of interstate commerce under the Act after reviewing deposition testimony and exhibits). Similarly, in the instant case, this Court has had an opportunity to conduct an extensive review of the record and of matters outside the pleadings to resolve the material issues. The parties seeking remand will prevail on the basis of the undisputed material facts and underlying law. However, my decision is limited solely to the questions relating to jurisdiction over the claims against Thrifty.

The purpose of PMPA is to establish "minimum Federal Standards governing the termination and nonrenewal of franchise relationships for the sale of motor fuel by the franchisor or supplier of such fuel." *Checkrite Petroleum, Inc. v. Amoco Oil Co.*, 678 F.2d 5, 7 (2d Cir.

1982), *quoting* S. Rep. No. 95-731, 95th Cong., 2d Sess. 15, *reprinted in* [1978] U.S. Code Cong. & Ad. News 873 (emphasis added). Congress enacted PMPA to protect franchisees from arbitrary or discriminatory termination of their franchises. S. Rep. No. 95-731, *supra* at 874. The Act limits the termination of any franchise except on the specifically enumerated grounds and upon compliance with notice requirements. 15 U.S.C. § §2802(a), (b)(1). Crucial elements that extend jurisdiction under the Act are the existence of a franchise relationship and the occurrence of an event within the regulatory scheme of the statute. *See* 15 U.S.C. §2802.

The status of Gulf as plaintiffs' initial franchisor is undisputed. Both the branded and unbranded dealers operated their stations under supply agreements with Gulf which predated June, 1978. Even the unbranded dealers sold Gulf gasoline under the company's trade name before the new marketing program in 1978. Thus, the branded dealers operate under a franchise agreement described in 15 U.S.C. §2801(1)(A); the unbranded dealers operate under a franchise within the reach of 15 U.S.C. § 2801(1)(B) (ii)(II). The triggering event for PMPA jurisdiction over these dealers arose when Gulf allegedly terminated the dealers franchises. The claims against Thrifty arises from the same nucleus of facts. Therefore, defendants can properly remove this action only if independent grounds of federal jurisdiction can be established over Thrifty.

The absence of an independent franchise agreement between Thrifty and plaintiffs defeated defendant's first attempt at removal. Defendants now contend that Gulf's assignment under the SFSR contract to Thrifty created a

"franchise relationship" between Thrifty and plaintiffs. However, the record lacks any evidence of a subsequent contract between Thrifty and plaintiffs; the record lacks any proof of a marketing plan by Thrifty for plaintiffs; finally, the parties do not mention the existence of any franchise fee imposed upon plaintiffs by Thrifty. All of the above items are essentially components of a franchise agreement. *See e.g.* Cal. Corp. Code §31005 (West 1977); *See also* 34 Cal. Jur. 3d, *Franchise, Distribution, and Dealership Contracts* §1 (3d ed. 1977).

Moreover, the issue of Thrifty's lack of Gulf trademark rights is undisputed. Thrifty generally asserts that the SFSR contract included "branding authority or trademark rights", but it points to the specific terms of that agreement noting, "Although, in general, 'Gulf indicia' are excluded from the sale under paragraph 2.07 of the SFSR Contract. . . ." See Thrifty's Supplemental Memorandum In Support of Jurisdiction at 4.[4] This Gulf indicia represents the trademark rights essential to finding a valid franchise relationship. *See* 15 U.S.C. § §2801 (1)(B)(i) and (2).[5]

In defining the "franchise relationship" under PMPA, the Congress recognized the interrelated nature of the leased premises with the motor fuel supply agreement in petroleum franchises. The Senate noted:

> The franchise relationship in the petroleum industry is unusual, in fact perhaps unique, in that the franchisor commonly not only grants a trademark license, but often controls, and leases to the franchisee, the real estate premises used by the franchisee. In addition, the franchisor almost always is the primary, even exclusive, supplier of the franchisee's principal item: motor fuel.

S. Rep. No. 95-731, 95th Cong., 2d Sess. 17, *reprinted in* 1978 U.S. Code Cong. & Ad. News 873, 875. Thus, it appears at *first glance* that Congress intended PMPA to reach every motor fuel supply agreement where the supplier is the primary source of fuel or the exclusive source. This broad reading of the statute could bring Thrifty within the definition of a franchisor "but for" the limiting language noted further in the legislative history. "The term 'franchise' is defined in terms of a motor fuel trademark license. It should be noted that the term is applicable *only to the use of a trademark* which is owned or controlled by a refiner." *Supra* at 888 (emphasis added).

Although the Ninth Circuit remains silent on whether branding authority is essential to the existence of a franchise relationship under PMPA, see *Sun Valley*, 711 F.2d at 141, most courts favor the express need for granting trademark use to support a finding of a franchise relationship. *See Lasko v. Consumers Petroleum of Connecticut, Inc.*, 547 F. Supp. 211, 219 (D. Conn. 1981) (implying necessity of branding authority), *and Blackwell v. Power Test Corp.*, 540 F. Supp. 802, 807 (D.N.J. 1981) (SAME), *aff'd. mem.*, 688 F.2d 818 (3d Cir. 1982). Given the emphasis placed on the use of trademark rights in PMPA cases, only two alternative theories could possibly provide jurisdiction over Thrifty absent branding authority by Gulf. Either the Court must find (1) a valid assignment of the franchise relationship by Gulf to Thrifty, or (2) it must find that Gulf and Thrifty's sales transaction involved a less than arms length deal between the parties. *See Bsales v. Texaco, Inc.*, 516 F. Supp. 655, 661 (D.N.J. 1981) (cited for the latter proposition).

The legislative history of PMPA allows the assignability of a petroleum franchise as provided by state law. S. Rep. No. 95-731, *supra* at 901. In the absence of an express agreement, the applicable California statutes "clearly manifest a policy in favor of the free transferability of all types of property, including rights under contracts." *Farmland Irrigation Co. v. Dopplmaier,* 48 Cal. 2d 208, 222, 308 P.2d 732, 740 (1957); *See* Cal. Civ. Code §14581 (West 1982); *see also,* Cal. Comm. Code § 2210 (West 1968).[6] But, a closer analysis of the PMPA legislative history reveals a district court's ability to invoke its equitable powers and preempt state law on assignability to comply with the overall scheme of the Act:

> [T]here is an area in which Federal termination provisions under this legislation and state-granted rights of assignability of a franchise man conflict. It is intended that the harmonizing of these competing interests be left to judicial balancing of competing equities on a case-by-case basis. No hard and fast statutory rule would accomplish the desired goal of harmonizing the competing statutory objectives as equitably as application of general principles of equity to specific fact situations.

S. Rep. No. 95-731, *supra* at 901.

Under PMPA, a franchisor's withdrawal from a relevant geographic market can amount to a termination of non-renewal of the franchise agreement that triggers both notice and first refusal rights for franchisors. *See* 15 U.S.C. §2802(b)(2)(E). The undisputed facts indicate that Gulf intended to seel all its assets in the Los Angeles Division and to withdraw from the highly competitive Southern California gasoline market.[7] The subsequent actions taken to see plaintiffs' leased premises and the

Santa Fe Springs Refinery are incidental to Gulf's stated purpose: market withdrawal. For this Court to find that the "package deal" involving Thrifty amounted to an assignment of the "franchise relationship," and not a market withdrawal, would result in the complete circumvention of the Act. Thus, it is my determination view that Thrifty cannot hold the same status as a franchisor to these plaintiffs as held by Gulf. At most, Thrifty may have an assignment of the leased premises under state law if Gulf complied with PMPA in the first instance.

As a general rule, a contractual relationship between the individual parties is a precondition for jurisdiction under PMPA. *See Bsales*, 516 F. Supp. at 662 N.4. However, a second alternative theory for PMPA jurisdiction over a noncontractual third party such as Thrifty involves a judicially recognized, narrow exception to the franchise relationship rule. In *Bsales*, the district court implied in *dicta* that through an "extraordinary situation" a landlord of premises used in a franchise operation may owe certain duties to the franchisee, even though the landlord is not a franchisor. 516 F. Supp. at 661. The district court noted:

> [I]f the landlord and the franchisor enter into a lease which is *not the product* of arm's length negotiations and that lease expires and is not renewed, then the franchisee may have a cause of action [under PMPA against both the franchisor and the landlord. Similarly, the absence of an arm's length relationship between the franchisor and the landlord at the time that an option to renew a lease is under consideration might give the franchisee rights against both parties, if the option is not exercised.

Id. at 661 (emphasis added)

In *Bsales*, similar to the allegations in this case, plaintiffs alleged a conspiracy existed between the franchisor and the landlord to deprive plaintiffs of their rights under PMPA. The district court did not find a conspiracy between the parties in the absence of "direct and explicit evidence of such a conspiracy." 516 F. Supp. at 662. The court concluded that an inference of a conspiracy could not be made merely by an allegation that the defendants negotiated with their own interest in mind, absent proof that the franchisor exercised control over the new landlord. *Id.* at 662-63. Even a party's negotiating in bad faith is not actionable under this theory. *Id.* at 663 n. 8.

The instant plaintiffs argue that defendants conspired to terminate their service station leases and deprive plaintiffs' of their first refusal right under PMPA. (See First Amended Complaint ¶33b.) The only evidence plaintiffs allege establishes a conspiracy between defendants Thrifty and Gulf is the SFSR contract and the September 1980 letter agreement, but the undisputed facts demonstrate these agreements resulted from vigorous negotiations to purchase Gulf's Los Angeles Division assets *after* Gulf decided to withdraw from that market. Although Gulf and Thrifty entered into a sales agreement that included the stations leased by plaintiffs, this Court finds plaintiffs have offered no evidence establishing an intent by either defendant to circumvent the Act. Nor is there any evidence that Gulf in any way controlled Thrifty's actions during their negotiations or anytime afterwards. While the complaint properly alleges, *inter alia*, Gulf failed to comply with the notice, termination, and first refusal rights of plaintiffs as

required by PMPA, these allegations are unrelated to any proven conspiracy between Gulf and Thrifty.

CONCLUSION

Having decided that the claims against Thrifty do not arise under PMPA, the Court no longer has an independent basis of subject matter jurisdiction to entertain plaintiffs state law claims against Thrifty. Limitations on the Court's power to exercise "pendent party" jurisdiction and the interrelatedness of the claims against all the defendants requires this Court to remand the entire case. Thus, the motions of plaintiffs for remand to state court are granted and the Court does not make any further findings.

Date: March 9, 1984

Terry J. Hatter, Jr.
TERRY J. HATTER, JR.
United States District Judge

FOOTNOTES

1. Plaintiff Herb Schweizer was one of several Gulf dealers to whom Gulf offered a right of first refusal to acquire its interest in the service station. Schweizer accepted Gulf's offer and thus has no claim against it for noncompliance with the Petroleum Marketing Practices Act, 15 U.S.C. §2801 *et seq.*

2. These plaintiffs are catagorized as "branded dealers." They are identified as Jack Abadjian, Brad May, and Al Rosenstein.

3. Since the Court has already determined that the claims against Gulf and Thrifty are inextricably intertwined, removability under 28 U.S.C. §1441(c) is also unavailable to these defendants. Section 1441(c) provides that a separate and independent federal claim may be joined with otherwise nonremovable state claims, thereby permitting removal of an entire action to federal court.

4. In addition, Barry W. Berkett, Vice President and Assistant Secretary of Thrifty Oil Co., testified through deposition testimony that he was unaware of any of the plaintiffs ever purchasing motor fuel from Thrifty as of December 2, 1983 (Berkett deposition at 16).

5. Thrifty has not, as of December 2, 1983, granted any of the plaintiffs the right to utilize the Gulf trademark (Burkett deposition at 36).

6. A contract may be nonassignable if the duties imposed upon one party is of such a personal nature that their performance by someone else would in effect deprive the contracting party of the benefit of its bargain. *See Dopplmaier,* 48 Cal.2d at 222, 308 P.2d at 740. It is possible that a franchise agreement involving trademark rights is such a contract, however, the present decision rests strictly on an interpretation of the federal statute involved in this case leaving questions of franchise agreement assignability to the state court for its resolution.

7. See I. Roger Kemple's deposition testimony at 78-79; 99-100.

APPENDIX D

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

JACK ABADJIAN, et al., Plaintiffs-Appellees, vs. THRIFTY OIL COMPANY, Defendant/Appellant, GULF OIL CORPORATION, a Pennsylvania corporation, et al., Defendants.	No. 84-5831
	DC# CV 83-6686 TJH Central California
	ORDER
	FILED July 3, 1984
AND RELATED CROSS-CLAIMS AND CONSOLIDATED ACTIONS	

Before: KENNEDY, ALARCON and FERGUSON, Circuit Judges

The appeal from the district court remand order is dismissed. *Thermatron Products, Inc. v. Hermansdorfer*, 423 U.S. 343, 346 (1975).

APPENDIX E

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

GULF OIL CORPORATION, a Pennsylvania corporation, et al., Petitioners, vs. UNITED STATES DISTRICT COURT FOR THE CENTRAL DISTRICT OF CALIFORNIA, Respondent, JACK ABADJIAN, et al., Real Parties in Interest.	No. 84-7330 DC# CV 83-6686 TJH Central California ORDER FILED Aug 22, 1984 PHILLIP B. WINBERRY Clerk, U.S. Court of Appeals

Before: ANDERSON, FARRIS and BOOCHEVER, Circuit Judges

The petition for writ of mandate is denied. Petitioner has not met the requirements of this circuit for extraordinary relief. *See Bauman v. United States District Court*, 557 F.2d 650 (9th Cir. 1977)

APPENDIX F

SUPERIOR COURT OF CALIFORNIA, COUNTY OF LOS ANGELES

Date DECEMBER 10, 1984
HONORABLE RONALD E. SWEARINGER JUDGE
___ Deputy Sherriff ___, Deputy Clerk
A.CARRASCO Court Attendant C HERNANDEZ, Reporter
NONE (Parties and counsel checked if present)

C 377 024 C/W C399330, C406851, C406852, C406853, C406854, C406855, C406857, C406858, C407545, C409749, C410941, C410942

Counsel for Plaintiff

Counsel for Defendant

JACK ABADJIAN, et al
VS
GULF OIL CORPORATION, et al

NATURE OF PROCEEDINGS:
RULING ON MOTIONS FOR SUMMARY JUDGMENT

The matters having been argued and submitted and the Court having considered the contents of the moving and responding papers and the authorities therein cited rules as follows:

PLAINTIFF'S MOTION:
Plaintiff's motion is granted. The Court finds the following issues to be without substantial controversy and are established in favor of Plaintiffs and against Defendants;

a. The September 30, 1980 agreement between Defendants was an event and an action that gave to each moving Plaintiff a right of first refusal to purchase Gulf's interest in their respective service stations.

b. Under the PMPA Defendant Gulf was obligated to offer each moving Plaintiff the right as aforesaid at least 45 days prior to the agreed upon closing date of the Gulf sale to Thrifty (may 1981).

GULF'S MOTION FOR SUMMARY JUDGMENT:

Gulf contends that Plaintiffs may not obtain state court relief for alleged franchise discontinuance because relief has not been sought under PMPA. Gulf further contends that PMPA preempts any state law dealing with alleged franchise termination.

Plaintiffs contend that they may obtain state court relief on the gravamens alleged in their complaints. *The Court agrees.* Counts 1, 6 and 7 relate to rights under the PMPA and PMPA Jurisdiction is not exclusively in the Federal Courts in the context of this proceeding.

Plaintiffs concede that to the extent that they have claims under Section 20999.1 Business and Professions Code, that Section has been preempted by the PMPA.

Count 2 is particulary preempted. Counts, 3, 4 and 5 are not based on alleged franchise termination as per PMPA but relate to other gravamen.

The moving party asks the Court to determine that the PMPA has preempted the field, contends that plaintiffs have taken the position that they are not proceeding under PMPA and that certain causes of action may not be pursued. The Court concludes that moving party is incorrect.

The motion is a hybrid, but the issues presented may be decided by the Court pursuant to *Beech Aircraft v. Superior Court* (1976) 61 Cal. App. 3d 501, 516.

The motion is denied.

THRIFTY'S MOTION FOR SUMMARY JUDGMENT RE IMPAIRMENT:

Thrifty contends that if Section 20999.25, Business and Profession Code were applied to the dispute, the obligation of the Gulf/Thrifty contract would be impaired since the Section was not in effect when the agreement was made.

This issue is moot since PMPA preempts Business and Professions Code Section 20999.25 (Cal Arco Distributors V. Atlantic Richfield) and Plaintiffs acknoledge this.

The motion is denied.

THRIFTY'S MOTION RE TERMINATION:

The motion is denied, the basis for the motion being obviated by the Court's ruling as to Plaintiffs' motion.

It is to be noted that the question of "termination" presented in the case does not relate to ordinary termination but must be considered in the context of the Petroleum Marketing Practices Act and the Court notes and concurs in the finding of Judge Terry Hatter of the United States District Court that Thrifty cannot be considered as a successor franchisor by assignment.

Copies of this minute order are mailed Via U.S. mail addressed as follows:

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RALPH ZAREFSKY
LOUIS A. KARASIK
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APPENDIX G

PETROLEUM MARKETING PRACTICES ACT,
15 U.S.C. §§ 2801-2806

SUBCHAPTER I–FRANCHISE PROTECTION

§ 2801. Definitions

As used in this subchapter:

(1)(A) The term "franchise" means any contract–

(i) between a refiner and a distributor.

(ii) between a refiner and a retailer,

(iii) between a distributor and another distributor, or

(iv) between a distributor and a retailer,

under which a refiner or distributor (as the case may be) authorizes or permits a retailor or distributor to use, in connection with the sale, consignment, or distribution of motor fuel, a trademark which is owned or controlled by such refiner or by a refiner which supplies motor fuel to the distributor which authorizes or permits such use.

(B) The term "franchise" includes–

(i) any contract under which a retailer or distributor (as the case may be) is authorized or permitted to occupy leased marketing premises, which premises are to be employed in connection with the sale, consignment, or distribution of motor fuel under a trademark which is owned or controlled by such refiner or by a refiner which supplies motor fuel to the distributor which authorizes or permits such occupancy;

(ii) any contract pertaining to the supply of motor fuel which is to be sold, consigned or distributed–

(I) under a trademark owned or controlled by a refiner; or

(II) under a contract which has existed continuously since May 15, 1973, and pursuant to which, on May 15, 1973, motor fuel was sold, consigned or distributed under a trademark owned or controlled on such date by a refiner; and

(III) the unexpired portion of any franchise, as defined by the preceding provisions of this paragraph, which is transferred or assigned as authorized by the provisions of such franchise or by any applicable provision of State law which permits such transfer or assignment without regard to any provision of the franchise.

(2) The term "franchise relationship" means the respective motor fuel marketing or distribution obligations and responsibilities of a franchisor and a franchisee which result from the marketing of motor fuel under a franchise.

(3) The term "franchisor" means a refiner of distributor (as the case may be) who authorizes or permits, under a franchise, a retailer or distributor to use a trademark in connection with the sale, consignment, or distribution of motor fuel.

(4) The term "franchisee" means a retailer or distributor (as the case may be) who is authorized or permitted, under a franchise, to use a trademark in connection with the sale, consignment, or distribution of motor fuel.

(5) The term "refiner" means any person engaged in the refining of crude oil to produce motor fuel, and includes any affiliate of such person.

(6) The term "distributor" means any person, including any affiliate of such person, who-

(A) purchases motor fuel for sale, consignment, or distribution to another; or

(B) receives motor fuel on consignment for consignment or distribution to his own motor fuel accounts or to accounts of his supplier, but shall not include a person who is an employee of, or merely serves as a common carrier providing transportation service for, such supplier.

(7) The term "retailer" means any person who pruchases motor fuel for sale to the general public for ultimate consumption.

(8) The term "marketing premises" means, in the case of any franchise, premises which, under said franchise, are to be employed by the franchisee in connection with the sale, consignment, or distribution of motor fuel.

(9) The term "leased marketing premises" means marketing premises owned, leased, or in any way controlled by a franchisor and which the franchisee is authorized or permitted, under the franchise, to employ in connection with the sale, consignment, or distribution of motor fuel.

(10) The term "contract" means any oral or written agreement. For supply purposes, delivery levels during the same month of the previous year shall be prima facie evidence of an agreement to deliver such levels.

(11) The term "trademark" means any trademark, trade name, service mark, or other identifying symbol or name.

(12) The term "motor fuel" means gasoline and diesel fuel of a type distributed for use as a fuel in self-propelled vehicles designed primarily for use on public streets, roads, and highways.

(13) The term "failure" does not include–

(A) any failure which is only technical or unimportant to the franchise relationship; or

(B) any failure for a cause beyond the reasonable control of the franchisee.

(14) The terms "fail to renew" and "nonrenewal" mean, with respect to any franchise relationship, a failure to reinstate, continue, or extend the franchise relationship–

(A) at the conclusion of the term, or on the expiration date, stated in the relevant franchise;

(B) at any time, in the case of the relevant franchise which does not state a term of duration or an expiration date; or

(C) following a termination (on or after June 19, 1978) of the relevant franchise which was entered into prior to June 19, 1978, and has not been renewed after such date.

(15) The term "affiliate" means any person who (other than by means of a franchise) controls, is controlled by, or is under common control with, any other person.

(16) The term "relevant geographic market area" includes a State or a standard metropolitan statistical area

as periodically established by the Office of Management and Budget.

(17) The term "termination" includes cancellation.

(18) The term "commerce" means any trade, traffic, transportation, exchange, or other commerce–

(A) between any State and any place outside of such State; or

(B) which affects any trade, transportation, exchange, or other commerce described in subparagraph (A).

(19) The term "State" means any State of the United States, the District of Columbia, the Commonwealth of Puerto Rico, the Virgin Islands, American Samoa, Guam, and any other commonwealth, territory, or possession of the United States.

§2802. Franchise relationship

General prohibition against termination or nonrenewal

(a) Except as provided in subsection (b) of this section and section 2803 of this title, no franchisor engaged in the sale, consignment, or distribution of motor fuel in commerce may–

(1) terminate any franchise (entered into or renewed on or after June 19, 1978) prior to the conclusion of the term, or the expiration date, stated in the franchise; or

(2) fail to renew any franchise relationship (without regard to the date on which the relevant franchise was entered into or renewed).

Precondition and grounds for termination or nonrenewal

(b)(1) Any franchisor may terminate any franchise (entered into or renewed on or after June 19, 1978) or may fail to renew any franchise relationship, if–

(A) the notification requirements of section 2804 of this title are met; and

(B) such termination is based upon a ground described in paragraph (2) or such nonrenewal is based upon a ground described in paragraph (2) or (3).

(2) For purposes of this subsection, the following are grounds for termination of a franchise or nonrenewal of a franchise relationship:

(A) A failure by the franchisee to comply with any provision of the franchise, which provision is both reasonable and of material significance to the franchise relationship, if the franchisor first acquired actual or constructive knowledge of such failure–

(i) not more than 120 days prior to the date on which notification of termination or nonrenewal is given, if notification is given pursuant to section 2804(a) of this title; or

(ii) not more than 60 days prior to the date on which notification of termination or nonrenewal is given, if less than 90 days notification is is given pursuant to section 2804(b)(1) of this title.

(B) A failure by the franchisee to exert good faith efforts to carry out the provisions of the franchise, if–

(i) the franchisee was apprised by the franchisor in writing of such failure and was afforded a reasonable opportunity to exert good faith efforts to carry out such provisions; and

(ii) such failure thereafter continued within the period which began not more than 180 days before the date notification of termination or nonrenewal was given pursuant to section 2804 of this title.

(C) The occurrence of an event which is relevant to the franchise relationship and as a result of which termination of the franchise or nonrenewal of the franchise relationship is reasonable, if such event occurs during the period the franchise is in effect and the franchisor first acquired actual or constructive knowledge of such occurrence–

(i) not more than 120 days prior to the date on which notification of termination or nonrenewal is given, if notification is given pursuant to section 2804(a) of this title; or

(ii) not more than 60 days prior to the date on which notification of termination or nonrenewal is given, if less than 90 days notification is given pursuant to section 2804(b)(1) of this title.

(D) An agreement, in writing, between the franchisor and the franchisee to terminate the franchise or not to renew the franchise relationship, if–

(i) such agreement is entered into not more than 180 days prior to the date of such termination or, in the case of nonrenewal, not more than 180 days

prior to the conclusion of the term, or the expiration date, stated in the franchise;

(ii) the franchisee is promptly provided with a copy of such agreement, together with the summary statement described in section 2804(d) of this title; and

(iii) within 7 days after the date on which the franchisee is provided a copy of such agreement, the franchisee has not posted by certified mail a written notice to the franchisor repudiating such agreement.

(E) In the case of any franchise entered into prior to June 19, 1978, and in the case of any franchise entered into or renewed on or after such date (the term of which is 3 years or longer, or with respect to which the franchisee was offered a term of 3 years or longer), a determination made by the franchisor in good faith and in the normal course of business to withdraw from the marketing of motor fuel through retail outlets in the relevant geographic market area in which the marketing premises are located, if–

(i) such determination–

(I) was made after the date such franchise was entered into or renewed, and

(II) was based upon the occurrence of changes in relevant facts and circumstances after such date;

(ii) the termination or nonrenewal is not for the purpose of converting the premises, which are the subject of the franchise, to operation by

employees or agents of the franchisor for such franchisor's own account; and

(iii) in the case of leased marketing premises–

(I) the franchisor, during the 180-day period after notification was given pursuant to section 2804 of this title, either made a bona fide offer to sell, transfer, or assign to the franchisee such franchisor's interest in such premises, or, if applicable, offered the franchisee a right of first refusal of at least 45 days duration of an offer, made by another, to purchase such franchisor's interest in such premises; or

(II) in the case of the sale, transfer, or assignment to another person of the franchisor's interest in such premises in connection with the sale, transfer, or assignment to such other person of the franchisor's interest in one or more other marketing premises, if such other person offers, in good faith, a franchise to the franchisee on terms and conditions which are not discriminatory to the franchisee as compared to franchises then currently being offered by such other person or franchises then in effect and with respect to which such other person is the franchisor.

(3) For purposes of this subsection, the following are grounds for nonrenewal of a franchise relationship:

(A) The failure of the franchisor and the franchisee to agree to changes or additions to the provisions of the franchise, if–

(i) such changes or additions are the result of determinations made by the franchisor in good faith and in the normal course of business; and

(ii) such failure is not the result of the franchisor's insistence upon such changes or additions for the purpose of preventing the renewal of the franchise relationship.

(B) The receipt of numerous bona fide customer complaints by the franchisor concerning the franchisee's operation of the marketing premises, if–

(i) the franchisee was promptly apprised of the existence and nature of such complaints following receipt of such complaints by the franchisor; and

(ii) if such complaints related to the condition of such premises or to the conduct of any employee of such franchisee, the franchisee did not promptly take action to cure or correct the basis of such complaints.

(C) A failure by the franchisee to operate the marketing premises in a clean, safe, and healthful manner, if the franchisee failed to do so on two or more previous occasions and the franchisor notified the franchisee of such failures.

(D) In the case of any franchise entered into prior to June 19, 1978, (the unexpired term of which, on such date, is 3 years or longer) and, in the case of any franchise entered into or renewed on or after such date (the term of which was 3 years or longer, or with respect to which the franchisee was offered a term of 3 years or longer), a determination made by

the franchisor in good faith and in the normal course of business, if–

(i) such determination is–

(I) to convert the leased marketing premises to a use other than the sale or distribution of motor fuel,

(II) to materially alter, add to, or replace such premises,

(III) to sell such premises, or

(IV) that renewal of the franchise relationship is likely to be uneconomical to the franchisor despite any reasonable changes or reasonable additions to the provisions of the franchise which may be acceptable to the franchisee;

(ii) with respect to a determination referred to in subclause (II) or (IV), such determination is not made for the purpose of converting the leased marketing premises to operations by employees or agents of the franchisor for such franchisor's own account; and

(iii) in the case of leased marketing premises such franchisor, during the 90-day period after notification was given pursuant to section 2804 of this title, either–

(I) made a bona fide offer to sell, transfer, or assign to the franchisee such franchisor's interests in such premises; or

(II) if applicable, offered the franchisee a right of first refusal of at least 45-days duration of an

offer, made by another, to purchase such franchisor's interest in such premises.

Definition

(c) As used in subsection (b)(2)(C) of this section, the term "an event which is relevant to the franchise relationship and as a result of which termination of the franchise or nonrenewal of the franchise relationship is reasonable" includes events such as–

(1) fraud or criminal misconduct by the franchisee relevent to the operation of the marketing premises;

(2) declaration of bankruptcy or judicial determination of insolvency of the franchisee;

(3) continuing severe physical or mental disability of the franchisee of at least 3 months duration which renders the franchisee unable to provide for the continued proper operation of the marketing premises;

(4) loss of the franchisor's right to grant possession of the leased marketing premises through expiration of an underlying lease, if the franchisee was notified in writing, prior to the commencement of the term of the then existing franchise–

(A) of the duration of the underlying lease, and

(B) of the fact that such underlying lease might expire and not be renewed during the term of such franchise (in the case of termination) or at the end of such term (in the case of nonrenewal);

(5) condemnation or other taking, in whole or in

part, of the marketing premises pursuant to the power of eminent domain;

(6) loss of the franchisor's right to grant the right to use the trademark which is the subject of the franchise, unless such loss was due to trademark abuse, violation of Federal or State law, or other fault or negligence of the franchisor, which such abuse, violation, or other fault or negligence is related to action taken in bad faith by the franchisor;

(7) destruction (other than by the franchisor) of all or a substantial part of the marketing premises;

(8) failure by the franchisee to pay to the franchisor in a timely manner when due all sums to which the franchisor is legally entitled;

(9) failure by the franchisee to operate the marketing premises for–

(A) 7 consecutive days, or

(B) such lesser period which under the facts and circumstances constitutes an unreasonable period of time;

(10) willful adulteration, mislabeling or misbranding of motor fuels or other trademark violations by the franchisee;

(11) knowing failure of the franchisee to comply with Federal, State, or local laws or regulations relevant to the operation of the marketing premises; and

(12) conviction of the franchisee of any felony involving moral turpitude.

Compensation, etc., for franchisee upon condemnation or destruction of marketing premises

(d) In the case of any termination of a franchise (entered into or renewed on or after June 19, 1978), or in the case of any nonrenewal of a franchise relationship (without regard to the date on which such franchise relationship was entered into or renewed)–

(1) if such termination or nonrenewal is based upon an event described in subsection (c)(5) of this section, the franchisor shall fairly apportion between the franchisor and the franchisee compensation, if any, received by the franchisor based upon any loss of business opportunity or good will; and

(2) if such termination or nonrenewal is based upon an event described in subsection (c)(7) of this section and the leased marketing premises are subsequently rebuilt or replaced by the franchisor and operated under a franchise, the franchisor shall, within a reasonable period of time, grant to the franchisee a right of first refusal of the franchise under which such premises are to be operated.

§ 2803. Trial and interim franchises Nonapplicability of statutory nonrenewal provisions

(a) The provisions of section 2802 of this title shall not apply to the nonrenewal of any franchise relationship–

(1) under a trial franchise; or

(2) under an interim franchise.

Definitions

(b) For purposes of this section–

(1) The term "trial franchise" means any franchise–

(A) which is entered into on or after June 19, 1978;

(B) the franchisee of which has not previously been a party to a franchise with the franchisor;

(C) the initial term of which is for a period of not more than 1 year; and

(D) which is in writing and states clearly and conspicuously–

(i) that the franchise a trial franchise;

(ii) the duration of the initial term of the franchise;

(iii) that the franchisor may fail to renew the franchise relationship at the conclusion of the initial term stated in the franchise by notifying the franchisee, in accordance with the provisions of section 2804 of this title, of the franchisor's intention not to renew the franchise relationship; and

(iv) that the provisions of section 2802 of this title, limiting the right of a franchisor to fail to renew a franchise relationship, are not applicable to such trial franchise.

(2) The term "trial franchise" does not include any unexpired period of any term of any franchise (other than a trial franchise, as defined by paragraph (1)) which was transferred or assigned by a franchisee to the extent authorized by the provisions of

the franchise or any applicable provision of State law which permits such transfer or assignment, without regard to any provision of the franchise.

(3) The term "interim franchise" means any franchise–

(A) which is entered into on or after June 19, 1978;

(B) the term of which, when combined with the terms of all prior interim franchises between the franchisor and the franchisee, does not exceed 3 years;

(C) the effective date of which occurs immediately after the expiration of a prior franchise, applicable to the marketing premises, which was not renewed if such nonrenewal–

(i) was based upon a determination described in section 2802(b)(2)(E) of this title, and

(ii) the requirements of section 2802(b)(2)(E) of this title were satisfied; and

(D) which is in writing and states clearly and conspicuously–

(i) that the franchise is an interim franchise;

(ii) the duration of the franchise; and

(iii) that the franchisor may fail to renew the franchise at the conclusion of the term stated in the franchise based upon a determination made by the franchisor in good faith and in the normal course of business to withdraw from the marketing of motor

fuel through retail outlets in the relevant georgraphic market area in which the marketing premises are located if the requirements of section 2802(b)(2)(E)(ii) and (iii) of this title are satisfied.

Nonrenewal upon meeting statutory notification requirements

(c) If the notification requirements of section 2804 of this title are met, any franchisor may fail to renew any franchise relationship–

(1) under any trial franchise, at the conclusion of the initial term of such trial franchise; and

(2) under any interim franchise, at the conclusion of the term of such interim franchise, if–

(A) such nonrenewal is based upon a determination described in section 2802(b)(2)(E) of this title; and

(B) the requirements of section 2802(b)(2)(E)(ii) and (iii) of this title are satisfied.

§2804. Notification of termination or nonrenewal of franchise relationship

General requirements applicable to franchisor

(a) Prior to termination of any franchise or nonrenewal of any franchise relationship, the franchisor shall furnish notification of such termination or such nonrenewal to the franchisee who is a party to such franchise or such franchise relationship–

(1) in the manner described in subsection (c) of this section; and

(2) except as provided in subsection (b) of this section, not less than 90 days prior to the date on which such termination or nonrenewal takes effect.

Additional requirements applicable to franchisor

(b)(1) In circumstances in which it would not be reasonable for the franchisor to furnish notification, not less than 90 days prior to the date on which termination or nonrenewal takes effect, as required by subsection (a)(2) of this section–

(A) such franchisor shall furnish notification to the franchisee affected thereby on the earliest date on which furnishing of such notification is reasonably practicable; and

(B) in the case of leased marketing premises, such franchisor–

(i) may not establish a new franchise relationship with respect to such premises before the expiration of the 30-day period which begins–

(I) on the date notification was posted or personally delivered, or

(II) if later, on the date on which such termination or nonrenewal takes effect; and

(ii) may, if permitted to do so by the franchise agreement, repossess such premises and, in circumstances under which it would be reasonable to do so, operate such premises through employees or agents.

(2) In the case of any termination of any franchise or any nonrenewal of any franchise relationship pursuant to the provisions of section 2802(b)(2)(E) of this title or section 2803(c)(2) of this title, the franchisor shall–

(A) furnish notification to the franchisee not less than 180 days prior to the date of which such termination or nonrenewal takes effect; and

(B) promptly provide a copy of such notification, together with a plan describing the schedule and conditions under which the franchisor will withdraw from the marketing of motor fuel through retail outlets in the relevant geographic area, to the Governor of each State which contains a portion of such area.

Manner and form of notification

(c) Notification under this section–

(1) shall be in writing;

(2) shall be posted by certified mail or personally delivered to the franchisee; and

(3) shall contain–

(A) a statement of intention to terminate the franchise or not to renew the franchise relationship, together with the reasons therefor;

(B) the date on which such termination or nonrenewal takes effect; and

(C) the summary statement prepared under subsection (d) of this section.

Preparation, publication, etc., of statutory summaries

(d)(1) Not later than 30 days after June 19, 1978, the Secretary of Energy shall prepare and publish in the Federal Register a simple and concise summary of the provisions of this subchapter, including a statement of the respective responsibilities of, and the remedies and relief available to, any franchisor and franchisee under this subchapter.

(2) In the case of summaries required to be furnished under the provisions of section 2802(b)(2)(D) of this title or subsection (c)(3)(C) of this section before the date of publication of such summary in the Federal Register, such summary may be furnished not later than 5 days after it is so published rather than at the time required under such provisions.

§2805. Enforcement provisions
Maintenance of civil action by franchisee against franchisor; jurisdiction and venue; time for commencement of action

(a) If a franchisor fails to comply with the requirements of section 2802 or 2803 of this title, the franchisee may maintain a civil action against such franchisor. Such action may be brought, without regard to the amount in controversy, in the district court of the United States in any judicial district in which the principal place of business of such franchisor is located or in which such franchisee is doing business, except that no such action may be maintained unless commenced within 1 year after the later of–

(1) the date of termination of the franchise or nonrenewal of the franchise relationship; or

(2) the date the franchisor fails to comply with the requirements of section 2802 or 2803 of this title.

Equitable relief by court; bond requirements; grounds for nonexercise of court's equitable powers

(b)(1) In any action under subsection (a) of this section, the court shall grant such equitable relief as the court determines is necessary to remedy the effects of any failure to comply with the requirements of section 2802 or 2803 of this title, including declaratory judgment, mandatory or prohibitive injunction relief, and interim equitable relief.

(2) Except as provided in paragraph (3), in any action under subsection (a) of this section, the court shall grant a preliminary injunction if–

(A) the franchisee shows–

(i) the franchise of which he is a party has been terminated or the franchise relationship of which he is a party has not been renewed, and

(ii) there exists sufficiently serious questions going to the merits to make such questions a fair ground for litigation; and

(B) the court determines that, on balance, the hardships imposed upon the franchisor by the issuance of such preliminary injuctive relief will be less than the hardship which would be imposed upon such franchisee if such preliminary injunctive relief were not granted.

(3) Nothing in this subsection prevents any court from requiring the franchisee in any action under

subsection (a) of this section to post a bond, in an amount established by the court, prior to the issuance or continuation of any equitable relief.

(4) In any action under subsection (a) of this section, the court need not exercise its equity powers to compel continuation or renewal of the franchise relationship if such action was commenced–

(A) more than 90 days after the date on which notification pursuant to section 2804(a) of this title was posted or personally delivered to the franchisee;

(B) more than 180 days after the date on which notification pursuant to section 2804(b)(2) of this title was posted or personally delivered to the franchisee; or

(C) more than 30 days after the date on which the termination of such franchise or the nonrenewal of such franchise relationship takes effect if less than 90 days notification was provided pursuant to section 2804(b)(1) of this title.

Burden of proof;
burden of going forward with evidence

(c) In any action under subsection (a) of this section, the franchisee shall have the burden of proving the termination of the franchise or the nonrenewal of the franchise relationship. The franchisor shall bear the burden of going forward with evidence to establish as an affirmative defense that such termination or nonrenewal was permitted under section 2802(b) or 2803 of this title, and, if applicable, that such franchisor complied with the requirements of section 2802(d) of this title.

Actual and exemplary damages and attorney and expert witness fees to franchisee; determination by court of right to exemplary damages and amount; attorney and expert witness fees to franchisor for frivolous actions

(d)(1) If the franchisee prevails in any action under subsection (a) of this section, such franchisee shall be entitled–

(A) consistent with the Federal Rules of Civil Procedure, to actual damages;

(B) in the case of any such action which is based upon conduct of the franchisor which was in willful disregard of the requirements of section 2802 or 2803 of this title, or the rights of the franchisee thereunder, to exemplary damages, where appropriate; and

(C) to reasonable attorney and expert witness fees to be paid by the franchisor, unless the court determines that only nominal damages are to be awarded to such franchisee, in which case the court, in its discretion, need not direct that such fees be paid by the franchisor.

(2) The question of whether to award exemplary damages and the amount of any such award shall be determined by the court and not by a jury.

(3) In any action under subsection (a) of this section, the court may, in its discretion, direct that reasonable attorney and expert witness fees be paid by the franchisee if the court finds that such action is frivolous.

Discretionary power of court to compel continuation or renewal of franchise relationship; grounds for noncompulsion; right of franchisee to actual damages and attorney and expert witness fees unaffected

(e)(1) In any action under subsection (a) of this section with respect to a failure of a franchisor to renew a franchise relationship in compliance with the requirements of section 2802 of this title, the court may not compel a continuation or renewal of the franchise relationship if the franchisor demonstrates to the satisfaction of the court that–

(A) the basis for such nonrenewal is a determination made by the franchisor in good faith and in the normal course of business–

(i) to convert the leased marketing premises to a use other than the sale or distribution of motor fuel,

(ii) to materially alter, add to, or replace such premises,

(iii) to sell such premises,

(iv) to withdraw from the marketing of motor fuel through retail outlets in the relevant geographic market area in which the marketing premises are located, or

(v) that renewal of the franchise relationship is likely to be uneconomical to the franchisor despite any reasonable changes or reasonable additions to the provisions of the franchise which may be acceptable to the franchisee; and

(B) the requirements of section 2804 of this title have been complied with.

(2) The provisions of paragraph (1) shall not affect any right of any franchisee to recover actual damages and reasonable attorney and expert witness fees under subsection (d) of this section if such nonrenewal is prohibited by section 2802 of this title.

§2806. Relationship of statutory provisions to State and local laws

(a) To the extent that any provision of this subchapter applies to the termination (or the furnishing of notification with respect thereto) of any franchise, or to the nonrenewal (or the furnishing of notification with respect thereto) of any franchise relationship, no State or any political subdivision thereof may adopt, enforce, or continue in effect any provision of any law or regulation (including any remedy or penalty applicable to any violation thereof) with respect to termination (or the furnishing of notification with respect thereto) of any such franchise or to the nonrenewal (or the furnishing of notification with respect thereto) of any such franchise relationship unless such provision of such law or regulation is the same as the applicable provision of this subchapter.

(b) Nothing in this subchapter authorizes any transfer or assignment of any franchise or prohibits any transfer or assignment of any franchise as authorized by the provisions of such franchise or by any applicable provision of State law which permits such transfer or assignment without regard to any provision of the franchise.

APPENDIX H

§ 1447. Procedure after removal generally

(a) In any case removed from a State court, the district court may issue all necessary orders and process to bring before it all proper parties whether served by process issued by the State court or otherwise.

(b) It may require the petitioner to file with its clerk copies of all records and proceedings in such State court or may cause the same to be brought before it by writ of certiorari issued to such State court.

(c) If at any time before final judgment it appears that the case was removed improvidently and without jurisdiction, the district court shall remand the case, and may order the payment of just costs. A certified copy of the order of remand shall be mailed by its clerk to the clerk of the State court. The State court may thereupon proceed with such case.

(d) An order remanding a case to the State court from which it was removed is not reviewable on appeal or otherwise, except that an order remanding a case to the State court from which it was removed pursuant to section 1443 of this title shall be reviewable by appeal or otherwise.

June 25, 1948, c. 646, 62 Stat. 939; May 24, 1949, c. 1'39, § 84, 63 Stat. 102; July 2, 1964, Pub.L. 88-352, Title IX, § 901, 78 Stat. 266.